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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

PATRICK ROEDLER, THOMAS McDONOUGH,
JEANNIE STROBEL, RICHARD PALMER,
NOREEN HOFT, and HJ COMPANY,
AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Petitioners,

DEPARTMENT OF ENERGY, SECRETARY
OF THE TREASURY, and UNITED STATES,
Defendants-Respondents,

vs.

NORTHERN STATES POWER COMPANY,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Does the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 et seq., trump the taking clause of the Fifth Amendment by implementing a contractual scheme where users of nuclear generated power pay a Congressionally mandated fee, collected by the Utility and paid over to the Governments' Nuclear Waste Trust Fund, dedicated to removal of Spent Nuclear Fuel (SNF), where it has been judicially determined that the government has breached its Contract obligations to remove SNF but retains and still collects hundreds of millions of dollars from the fee payers who received nothing in return? The Court's below denied fee payers, prayer for legal and equitable relief dismissing the Complaint under F.R.C.P. 12(b)(6).

2. Can the District Court and the Court of Appeals for the Federal Circuit deny the clear intent of Congress that make utility customers of nuclear generated power under the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101, et seq., third party beneficiaries under the mandated Standard Contract 10 C.F.R. § 961.11 governing removal of Spent Nuclear Fuel where customers have paid congressionally mandated fees and have received nothing in return?

PARTIES TO THE PROCEEDING

The parties, plaintiffs, are all users of electric energy produced from nuclear fuel by Northern States Power Company. HJ Companies is a non-public individually owned Minnesota corporation.

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OPINIONS BELOW

The United States District Court for the District of Minnesota filed the District Court's Memorandum Opinion and Order on December 23, 1999, granting Federal Defendant's Motion to Dismiss; granting Northern States Power's Motion to Dismiss or in the alternative for Summary Judgment; Dismissing Plaintiff's Complaint with prejudice; Dismissing Northern States Power's Cross Claim with Prejudice and dismissing Plaintiff's August 8, 1998 Complaint in *toto*. Appendix. 72.

Appeals were timely filed to the United States Court of Appeals for the Federal Circuit. The Court filed an opinion and judgment that was entered on July 6, 2001, affirming the District Court's opinion below on the grounds Plaintiffs had no contract rights and thus no grounds for relief and affirmed the District Court finding that Plaintiffs have not established grounds for a taking under the Fifth

Amendment and affirmed the dismissal of the taking claim.

Although properly before it on appeal the Court of Appeals for the Federal Circuit did not address the unjust enrichment count or count six of plaintiff's complaint seeking a declaration of Northern States Power's interest in the collected fees; or the count seeking injunctive relief against further collections of the fee or whether the claims were barred ay the filed rate doctrine.

The Court of Appeals found that jurisdiction existed in the U.S. District Court under 28 U.S.C. § 1346(a)(2) (Little Tucker Act) and the Court of Appeals for the Federal Circuit had jurisdiction under 28 U.S.C. § 1295 (a)(2).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101 (c). The Petition is timely filed within 90 days of the entry of judgment entered on July 7, 2001, below.

The Jurisdiction in the U.S. District Court of the District of Minnesota was invoked by the Plaintiffs 28

U.S.C. 1346(a)(2) (Little Tucker Act), 28 U.S.C. 2201-2202 (Declatory Judgment Act), 28 U.S.C. 1651 (All Writs Act), and the Fifth Amendment of the U.S. Constitution.

STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution U.C.A#5.

2. The Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 et seq,

3. The Little Tucker Act 28 U.S.C. § 1346(a)(2).

STATEMENT OF RELATED CASES

No other appeal in or from the same civil action in the District Court was previously before this or any other appellate court under the same or similar title.

Resolution of the issues in this case may directly or indirectly affect one action pending Court in which similar claims arising from the same facts have been asserted by Defendant NSP against the Federal Defendants. The case is Northern States Power Company v. United States, CFC File No. 98-484C, in the U.S. Court of Claims.

STATEMENT OF THE CASE

Plaintiffs are members of a class of utility customers who have paid at least $300 million in fees to the DOE for disposal of spent nuclear fuel, and who seek to recover from DOE in light of DOE's utter failure to dispose of the fuel as required by a federally mandated contract with nominal defendant, Northern States Power Company ("NSP"). Plaintiffs brought this class action suit under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), for breach of contract or, alternatively, for taking their property without compensation in violation of the Fifth Amendment and for other legal and equitable relief. Complaint App. 72-100.

It has been judicially established the United States has breached its contract and has failed to perform its obligation required by the DOE's standard contract with utilities.

The District Court found that the utility fee paying customers failed to state a claim for breach of contract, finding that they were not third-party beneficiaries of DOE's contract with NSP. Having made that finding, the court went on to rule that absent a breach of contract claim, it lacked jurisdiction under the Tucker Act to adjudicate claims against the federal defendants. Further the District Court determined that the utility customers lacked standing because they could not demonstrate ownership of the fees paid into the statutorily created Nuclear Waste Fund (NWF). Thus, the court reasoned, the utility customers failed to state a taking claim on which relief could be granted.

In the oral argument in the case brought by utilities challenging DOE's declaration that it was not obligated to dispose of Spent Nuclear Fuel ("SNF") from the nation's utilities nuclear plants pursuant to its Standard Contracts the District of Columbia Circuit, Judge Ginsberg asked this question of DOE counsel:

> So what did they get for their money? Or is this just a giant swindle from the outset? . . . They were to pay you money and you were to do nothing that you didn't want to? There is an old expression in the Yiddish that translates in English to "here's air, give me money." That's what it sounds like. App. 158.

Cited to Indiana Michigan Power Co. v. Dep't of Energy, 88 F.3d 1272, 1276 (D.C. Cir. 1996).

Nuclear power-supplied customers – not the utilities, not the taxpaying public generally – are still paying funds into DOE's Nuclear Waste Fund and those customers have still received nothing for their money in face of the judicially determined breach by the Government of its contractual obligations.

On August 7, 1998, Plaintiff's brought suit to recover previously paid fees of its contractual obligations and to obtain injunctive and declaratory relief against further collection of these fees by NSP on behalf of DOE. The uncontroverted fact is that plaintiffs and putative class members (collectively "Plaintiff's") have made and are still making payments into the Nuclear Waste Fund established by the Nuclear Waste Policy Act, 42 U.S.C. § 10101, et seq., and have and are receiving nothing in return for their payments.

From 1983 to date, Plaintiffs, NSP's customers, have paid in excess of $300 million into the NWF. NSP customers paid these funds to the DOE for permanently disposing of SNF generated by NSP's nuclear plants as a separate line item on their utility bills. Congress, through the NWPA, mandated the DOE contract with nuclear utilities to dispose of nuclear waste generated at their power plants, and required DOE to begin accepting wastes for disposal no later than January 31, 1998. DOE entered into Congressionally mandated contracts with nuclear utilities, including NSP, for waste disposal pursuant to DOE's Standard Contract and accompanying rules, found in 10 C.F.R. § 961. App. 128.

Plaintiffs and other utility customers who purchased nuclear-generated energy have been and are the sole source of funds paid into the NWF. The District Court concluded that Plaintiffs have no legal basis for recovering their money or for equitable relief, notwithstanding DOE's judicially determined breach of its obligation to accept nuclear waste for disposal. App. 69.

I. THE NUCLEAR WASTE POLICY ACT OF 1982

Congress passed the NWPA, in part, "to establish the Federal responsibility, and a definite Federal policy, for the disposal of high-level radioactive waste and spent fuel." 42 U.S.C. § 10131(b)(2). The provision of the NWPA at the center of this controversy is 42 U.S.C. § 10222, which established the Nuclear Waste Trust Fund and authorized DOE to enter into contracts to dispose of Spent Nuclear Fuel. Section 10222 of the act provides, in part:

> (a) **Contracts**
>
> (1) In the performance of his functions under this chapter, the Secretary [of Energy] is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, such contracts shall provide for payment to the Secretary of fees pursuant to [Paragraph] (2)....

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour

(5) Contracts entered into under this section shall provide that-

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of this high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter. (Emphasis added).

Through this section of the Act, Congress accomplished a number of objectives: it authorized DOE to contract for the disposal of spent nuclear fuel; provided that in exchange for the payment of fees, DOE must accept wastes for disposal beginning not later than January 31, 1998; and set the fee to be charged under the contracts at 1 mil per kilowatt-hour ("KWH"). The fees collected and deposited in the NWF, are administered for the United States by the Secretary of the Treasury, a defendant here. 42 U.S.C. § 10222(e).

The legislative history of this section of the NWPA demonstrates Congress intended that utility customers using nuclear power would bear the costs of the SNF disposal program through collection of the congressionally mandated fees by utilities, and also intended that the customers were to benefit directly from the disposal of these wastes.

Members of Congress uniformly agreed that utility customers should foot the bill to dispose of SNF. After the two chambers passed their respective versions of the Act, a conference committee proposed a compromise version of the bill that was presented to the Senate. In arguing for passage of the conference report, the floor manager stated to his colleagues in the Senate[1]:

> The bill includes several new or modified concepts from the bill passed by the Senate in the last Congress. One of the most noteworthy of those is the proposal for an assured full-cost recovery by the Federal Government from nuclear power-supplied rate-payers for the nuclear waste programs included in the bill. By establishing a 1 mill-per-kilowatt-hour users fee on nuclear generated electricity, this bill for the first time would provide a direct financial linkage between the beneficiaries of nuclear power and the cost for interim management and ultimate disposal for nuclear wastes.
>
> The bill provides for a contractual fee, initially set at 1 mill per kilowatt-hour, which would be charged on the production of electricity from nuclear powerplants.

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[1] They were House Bill 3809, which was eventually passed into law, and Senate Bill 1662.

> Receipts from this fee would be places in a separate account in the Treasury established solely for this purpose and would then be appropriated for the waste program on an annual basis. According to the Congressional Budget Office this fee is adequate to cover the costs of this legislation well into the 1990's. However, the bill requires that the adequacy of the fee be reviewed on an annual basis, and the fee could be modified in the future if receipts fell below costs of the program. 128 Cong. Rec. § 15655 (daily ed. Dec.20, 1982) (statement of Sen. McClure floor manager) (emphasis added).

Senator McClure's statement on the floor of the Senate demonstrates Congress's intent and understanding that the fee for nuclear waste disposal would be collected "from nuclear power-supplied rate-payers." App. 154-161.

The legislative history of the Act contains numerous indications that Congress recognized that nuclear power-supplied customers would pay for SNF disposal through fees assessed under the Standard Contracts. The intent behind the provision dealing with funding of the waste disposal program did not change from early versions of the Act to the final version. In 1981, the House Committee on Science and Technology passed House Bill 5016, an earlier version of what eventually became the NWPA.

Senator McClure's statement here is virtually identical to the one he made upon introducing S. 1662 on the

Senate floor. 128 Cong. Rec. 8001 (final ed. Apr. 28, 1982), App. 172-175. The identity of the Senator's remarks demonstrates that the intent behind S. 1662 regarding the source and purpose of payments into the NWF remained unchanged through the compromise bill's passage in December 1982.

No conference committee report was published with this bill. The Court should look to the floor statements of the conference managers of the bill as strong evidence of congressional intent. See Friends of the Boundary Waters Wilderness. "[T]he fact that the users of nuclear energy will pay a relatively modest fee, estimated to be about 1 mil per kilowatt hour, to pay for the Test and Evaluation Facility and the civilian geologic repository, should eliminate any criticism of this as a Federal subsidy for nuclear power".[2] H.R. Rep. 97-411, pt. 1, at 48-49 (1981), App. 176.

In the course of consideration of S. 1662 by the Senate Committees on Energy and Natural Resources and Environment and Public Works, Senator Tsongas also expressed approval of the funding plan:

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[2] Because DOE failed to begin accepting SNF by January 31, 1998, it is in breach of the Standard Contracts, it has not defenses too the breach, and it is liable for damages caused by its breach. Northern States Power Co. v. DOE, et al. 128 F.3d at 761.

> "I fully support the Chairman in his effort to assure that the Federal Government recovers the cost of the nuclear waste programs included in this bill from nuclear power supplied rate-payers." S.Rep. 97-282 at 66 (1981). These Committees also recognized that the fee was "to be collected by the utility operator..." Id. at 2, App. 173.

Moreover, Congress recognized at the time of consideration of the Act, and all parties have recognized consistently since, that the scheme for disposal of SNF embodied in the Act was intended to benefit not just the general public, but specifically the customers of nuclear utilities. Congress's scheme is a user fee pure and simple, not a utility rate; the user gets the benefit, the user pays the cost. Congress understood that nuclear power-supplied customers would benefit from the use of that power, as well as the consequent disposal of waste from civilian nuclear reactors.

A statement from the House Committee on Interior and Insular Affairs in its report on H.R. 3809 sums up the unanimity of approval of the principle that the customers would pay for the disposal of SNF, as well as Congress's intent that customers would directly benefit from the disposal program:

> As has been emphasized and reiterated over the lifetime of the Federal nuclear program, high level wastes should not be a burden on future generations, and must be disposed of by those who benefited from the energy

> derived from the nuclear activities which created the wastes. H. R. Rep. 97-491, Pt. 1, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 3792, 3796, (emphasis added). App. 186.

Congress created a statutory structure it intended would result in fair treatment to utility users of atomic generated energy. Those utility customers would bear the financial burden of paying the cost of nuclear waste disposal, but would also benefit from that disposal. As it has played out, however, the utility customers have received only the burden of paying the fees without the benefit of disposal, hardly that which congress intended.

II. PAYMENT OF THE STATUTORY FEE BY THE PLAINTIFFS

There is no genuine dispute that Plaintiffs are the parties truly paying funds into the NWF. The fee appears euphemistically on every NSP customer's bill as a "resource adjustment." Hervey Affidavit, App. 129. Moreover, both DOE and NSP have admitted in congressional testimony and public statements that the fee under the NSP Contracts is paid by customers, not the utility's shareholders.

In addition to the committee report language quoted above, testimony at congressional hearings shows that all parties realized the utilities would simply collect the fee from utility customers and pass that money through to the NWF.

Sherwood H. Smith, Jr., Chairman and Chief Executive Officer of Carolina Power and Light Co., testified on behalf of a number of trade groups, including the American Nuclear Energy Council, the Edison Electric Institute (of which NSP was and is a member), and the Utility Nuclear Waste Management Group. Mr. Smith testified:

> "We in the utility industry are not enthusiastic about serving as tax collectors for the Federal government; in fact, we view it as a[n] undesirable precedent." *Nuclear Waste Disposal:* Joint Hearings Before the Senate Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Senate Comm. on Env't and Pub. Works on S.637 and S.1662, 97th Cong., at 338, 366 (1981) (hereinafter "Smith Testimony"). App. 194.

Mr. Smith also discussed with the members of the committees whether "pass-through" of waste disposal costs to utility customers would be approved by state utilities commissioners:

Senator SIMPSON: "Would the mandatory fee that is proposed under this legislation be automatically recoverable from the rate-payer?"

Mr. SMITH: "If it is mandated from Congress, yes. The situation today is, some companies are collecting a fee which is based on current DOE estimates for the cost of spent fuel." If it is mandated by Congress it [fee] would flow though in all jurisdictions.

Similar testimony was presented by another utility representative, Bart D. Withers, Vice President, Nuclear, for Portland General Electric Co.:

> We support the assurance of funding for nuclear waste management activities by assessing a fee of 1 mill [sic] per kilowatt-hour for electricity generated by nuclear power plants. Although PGE does not consider requiring utilities to, in effect, collect Federal taxes to be a desirable precedent this fee is supported since it will provide necessary funding for the program. App. 212.

National Nuclear Waste Policy Act of 1981: Hearings on S.1662 before the Subcomm. on Nuclear Regulation of the Senate Comm. on Env't and Pub. Works, 97th Cong., at 46 (1981) (emphasis added) Id. The industry's recognition that the assessment would "flow through" the utilities to the DOE demonstrates the universal understanding of the nuclear industry that the fees would be paid by Plaintiffs and others like them i.e. the customers. The utilities made certain that their shareholders would not bear the financial burden of nuclear waste disposal.

NSP itself has acknowledged by public statements made on numerous occasions that its customers, rather than NSP, is the source of the NWF funds. James J. Howard, Chairman of the Board and Chief Executive Officer of NSP, testified before Congress that:

> "[t]o date, rate-payers have paid nearly $8 billion into this fund. NSP customers alone have contributed more than $200 million." Statement of James J. Howard before the Oversight and Investigations and Energy and Natural Resource Subcomm. of the House Comm. on Natural Resources, March 17, 1994, A700. App. 141.
>
> Mr. Howard also stated, "The administration is keenly aware that utility customers have helped build a $14 billion Nuclear Waste Fund so DOE could fulfill its 1998 obligation." "State of the Industry," Speech by James J. Howard to the Nuclear Energy Assembly, May 14, 1998, App. 152.

NSP has made similar admissions in its press releases. In one such release NSP claimed that "Through the standard contract between each utility and, DOE consumers have paid billions of dollars to the Nuclear Waste Fund since 1982" "Court Affirms DOE's Unconditional Obligation to Accept Spent Nuclear Fuel," NSP Press Release dated November 14, 1997 (emphasis added), App. 206. In this statement, NSP not only acknowledged that it is the customers that are funding the NWF, but that the funding is "through the standard contract."

A. Appellate Court Litigation

DOE's breach has been judicially determined in two cases brought under the NWPA.

United States Court of Appeals for the D.C. Circuit found that section 302(a)(5)(B) of the NWPA, 42 U.S.C. § 10222(a)(5)(B), creates an obligation in the DOE, reciprocal to the utilities' obligation to pay their customers' money into the NWF, to start disposing of SNF no later than January 31, 1998. Indiana Michigan Power, 88 F.3d at 1272, 1276 (D.C. Cir. 1996).

Following the Indiana Michigan decision, NSP, along with numerous other utilities and state regulatory agencies, petitioned the court for a writ of mandamus requiring DOE to begin disposing of the waste by the statutory and Contractual deadline of January 31, 1998. While the court found that the Petitioners had a clear right to relief and DOE had a clear duty to act, it declined to issue the requested writ of mandamus because it concluded petitioners [utilities] had another potentially adequate remedy under the Standard Contracts. Northern States Power Co., 128 F.3d at 754. (D.C. Cir. 1997) Cert denied. 525 U.S. 1015 (1998).

B. Court Of Claims Litigation

A number of utilities, including NSP, followed up on the determinations by the D.C. Circuit that DOE had breached its Standard Contracts by filing actions for damages in the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(l). In NSP's suit against DOE, NSP sought $1 billion from DOE, including various categories of damages, one of which was the fees paid by its customers into the NWF, which NSP estimated as $250 million. Northern States Power Co. v. United States of America, 43 Fed. Cl. 374, 382 (Fed. Cl. 1999).

SUMMARY OF THE ARGUMENT

The fees Plaintiffs paid to DOE through NSP are not taxes, for only persons like Plaintiffs who are customers of utilities that generate nuclear power not the general public-are forced to pay these fees. Plaintiffs were to have the benefit of nuclear power, which they have received, and the benefit of disposal and storage of the waste generated by that power, which they have not received.

When it passed the NWPA, Congress clearly stated its intentions to benefit utility customers and to make them bear the costs of SNF disposal. Additionally, NSP has repeatedly acknowledged that its customers rather than its shareholders were paying for disposal of SNF, and that the purpose of the Standard Contract was to benefit its customers. Given these facts, Plaintiff utility customers are third-party beneficiaries of the Standard Contracts between

DOE and NSP, and have stated a claim for DOE's breach of those contracts.

Further, Plaintiffs state a claim to recover the approximately 300 million dollars they have paid to DOE and to enjoin any further collection of the fee. In light of DOE's breach of contract, collection of these fees constitutes an unconstitutional taking of Plaintiffs' property. That is, even if DOE did not collect Plaintiffs' money for their benefit (thereby making them third-party beneficiaries of the Standard Contracts), it still took their money without just compensation, which constitutes an unconstitutional taking. Either way, Plaintiffs stated a claim to relief justiciable in the District Court under the Little Tucker Act.

REASONS FOR GRANTING THE WRIT

THE STANDARD OF REVIEW OF ALL ISSUES IS DE NOVO

It is recognized that third-party beneficiaries law is plagued by uncertainties, conceptual difficulties and confusion. Busby School of Northern Cheyenne Tribe v. U.S., 8 Cl.Ct. 596, 602 (1985).

As stated in State of Montana v. United States, 124 F.3d 1269, 1273 (Fed. Cir. 1997), [Indeed] "there have been conflicting decisions in the Court of Federal Claims as to the proper test to determine when a party can be considered an intended third party beneficiary." In view of the diverse opinions among the circuits this Court should visit this important subject.

As to the taking claim, by any rational standard the DOE's collection of past and future fees pursuant to a breached contract where the Court denies a remedy and defies the teachings of Andrus and is a taking with in the teaching of this Court's standard of "justice and fairness," Andrus v. Allard, 444 U.S. 51, 65, 100 S. Ct 318, 327 (1979).

The District Court wrongfully dismissed the Plaintiffs' takings claim for lack of standing, and for lack of subject matter jurisdiction under the Little Tucker Act, and failure to state a claim on which relief could be granted in face of clear authority of this Court to the contrary. The standard of review if the petition is granted is de novo. The Writ should issue to correct obvious errors of law and fact; conflicting statements of the law, breach of standards set by this Court and to remedy a manifest injustice mirrored in this litigation.

PLAINTIFF'S ARE THIRD PARTY BENEFICIARIES OF THE STANDARD CONTRACTS BETWEEN THE GOVERNMENT AND NSP.

Since 1983, Plaintiff's have been paying fees to DOE for the storage and disposal of SNF. Although, Plaintiff's have paid for nuclear-generated power during that time, they have also paid for and not received the benefit of proper long-term storage or disposal of SNF, for which they have separately paid millions of dollars into the NWF.

To determine whether Plaintiff's are third-party beneficiaries of the Standard Contracts, the Court musts examine "whether the contract[s] [reflect] the express or implied intention of the parties to benefit the third party. . ." Schuerman v. United States, 30 Fed Cl. 420, 433 (Fed Cl. 1994). As the Court of Federal Claims has held and the District Court acknowledged, "[t]he intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby.' Citing Montana v. United States, 124 F.3d 1269, 1273 (Fed Cir. 1997).

If the Standard Contracts for the disposal of Spent Nuclear Waste were not intended to benefit the Plaintiffs who could they be designed to benefit? Not the general public, because those not using nuclear energy have no need to store or dispose of SNF. Not the utilities because they can obtain energy elsewhere and simply pass the increase costs on to Plaintiffs. Only utility customers benefit from having access to cost-effective nuclear energy. Unlike utilities, their customers are stuck with the source of energy that supplies their power. That is why Congress mandated the customers would pay for waste storage, because the customers would previously have benefited from nuclear power.

A. The NWPA'S Legislative History and NSP's Admissions Demonstrate that Plaintiffs are Third-Party Beneficiaries.

Where an agreement is based on statutory requirements, the conditions of agreement do not arise from negotiations between the parties but rather are dictated by statute. "Statutory intent, therefore, is more relevant to the interpretation of these conditions than are common law contract principles." Renddleman v. Bowen, 860 F.2d 1537, 1541, (9th Cir. 1988); Busby School of Northern Cheyenne Tribe v. United States, 8 CL. Ct. 596, 602 (Ct. Cl. 1985) (when construing contract based on federal statute, court is to look to " the pertinent statutes and regulations and the underlying policy behind the contracts and applicable statutes and regulations.").

As discussed above, there is clear evidence that Congress, DOE and the utilities all understood that utility customers would be paying the fee imposed under the

Standard Contracts, and that the utilities would simply be collecting the fee for the United States. Further examination of the NWPA's legislative history demonstrates that Congress specifically identified the customers' interest in the program.

In the course of floor debate on S. 1662, the Senate version of the NWPA, Senator Jackson spoke on the topic of the inclusion of an SNF test disposal and evaluation facility. First, Senator Jackson applauded the fact that nuclear power-supplied utility customers, as the beneficiaries of nuclear power, would bear the financial burden of waste disposal:

> Mr. President, the bill before us provides a means of funding the ongoing research and development activities and the construction and operation of nuclear waste facilities resulting from civilian nuclear power plants. In this formulation, the full cost of such activities is borne by those who derive the benefits from the nuclear power plants; namely, the rate payers, as opposed to the taxpayers. 128 Cong. Rec. § 4257 (Daily Ed. April 29, 1982), App. 188.

Senator Jackson then questioned the propriety of imposing additional costs on the utility customers for the test and evaluation facility, explicitly recognizing the customers' interest in the nuclear waste disposal plan envisioned by the legislation:

> I believe that the test and evaluation facility as envisioned in this bill at the present time could represent an expensive sidetrack to the program with little return to the rate payers' interest in insuring the development of repositories at an early time at the least cost.

Congress thus recognized that the interests of utility customers were different from those of taxpayers, and that utility customers had a specific interest in the development of a civilian nuclear waste repository.

[W]here the language of a statute does not clearly state the legislature's intent in enacting the law, [the courts] look to the legislative history for an explanation of legislative intentions." Martin J. Simko Construction Inc. v. United States, 852 F.2d *540*, 542-43 (Fed. Cir. 1988) (looking to legislative history of the Contract Dispute Act of 1978, despite clear language of the statute). The legislative history of the NWPA, which required DOE to enter into the Standard Contracts is the expression of the government's intent in entering the Standard Contracts with NSP, and demonstrates Congress's intent to benefit utility customers.

The first source of congressional intent is the language of a statute, "[t]he chief objective of statutory interpretation is to give effect to the legislative will." Passamaquoddy Tribe v. Maine, 75 F.3d 784, 788 (1st Cir. 1988) (citing Negonsott v. Samuels, 507 U.S. 99 (1993)).

That means, courts must not only consider statutory language, but must also "take into account the tacit assumptions that underlie a legislative enactment. ..." Id. at 789 (citing Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930).

As has been demonstrated at some length, Congress's assumptions underlying the statutory deal to impose the Standard Contracts were:

1) that utility customers would pay; and
2) that utility customers would benefit.

B. Plaintiffs Are Not Required To Demonstrate A Specific Intent In The NSP Contracts To Give Them Enforceable Rights To Compensation For Breach Of Those Contracts

Although the Federal Circuit has rejected such a requirement, the District Court erroneously concluded, that to recover as third-party beneficiaries, Plaintiffs were required to provide "direct evidence in the contract that the contracting parties intended to give the third party any enforceable right to sue for compensation." The District Court applied the "second prong" of a test developed in Baudier Marine Electronics Sales and Service, Inc. v. United States, 6 Cl. Ct. 246, 249, aff'd, 765 F.2d 163 (Cl. Ct. 1984). The second prong of the Baudier test is applicable only in a limited set of circumstances not present here, however, and the District Court erred by finding otherwise. See, e.g., Schuerman, 30 Fed. Cl. at 428-33; State of Montana v. United States, 124 F.3d at 1273 (Fed. Cir. 1997). In Schuerman, the court found that:

> The second prong of Baudier may be applicable in certain limited circumstances, but the court [in Baudier] improvidently adopted this requirement as a per se rule to be employed in all third-party beneficiary cases. The obvious result of this misapplication of third-party beneficiary law has been the constriction of jurisdiction without a reason in law or binding precedent to justify it.
> 30 Fed. Cl. at 428.

The District Court imposed the same erroneous constriction on its jurisdiction under the *Little Tucker Act* without justification in law or fact. In its analysis of the viability of the second prong of the Baudier test, the court in Schuerman traced the rule's likely origins back to the Restatement of the Law (Second) Contracts § 313. That provision, entitled "Government Contracts," provides in part that:

> [A] promisor who contracts with a government or governmental agency to do an act for or under a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless:
> (a) the terms of the promise provide for such liability; or

> (b) the promise is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and providing remedies for it breach.

First, this provision applies on its face only to actions against promisors who have contracted with a government agency, and does not address the question of actions brought against the government itself. Second, in Schuerman, the court found that "the policy rationale supporting section 313 of the Restatement pertains only to cases involving general government contracts that are intended to benefit the community as a whole, as opposed to a specific individual." 30 Fed. Cl. at 429.

By concluding that the second Baudier prong applied, the District Court erroneously categorized Plaintiffs' claims as those brought by a random member of the public based solely on the general benefits that disposal of nuclear waste would confer on the public. But the fact that the NSP Contracts may in some sense confer a benefit to the general public i e benefits associated with the safe storage of spent nuclear fuel, does not complete the inquiry.

In determining whether this case fits within the narrow reach of Baudier's "second prong," the Court must look to the nature of the Plaintiffs' claims. Plaintiffs are not members of the general public suing because DOE's failure to accept SNF from NSP has deprived them of the general safety benefits that all United States citizens would have received had DOE performed under its Standard Contracts. In contrast, Plaintiffs seek redress because, as customers of a nuclear utility, they have paid over $300 million into the NWF and have received nothing in return. In exchange for the payment of these fees, DOE was required to accept spent nuclear fuel for disposal. 42 U.S.C. § 10222(a)(5)(B). Because DOE has breached its contract, Plaintiffs will not receive the benefits associated with disposal of SNF, namely the continued use of nuclear-generated power.

Congress recognized the distinction between utility customers and the general public in its consideration of the NWPA. For example, during hearings on S .1662, Senator Henry M. Jackson stated:

> We must also provide a funding mechanism for these activities where the full cost of the disposal of civilian nuclear waste is borne by those who derive the benefits from nuclear power as opposed to taxing the general population.

National Nuclear Waste Policy Act of 1981: Hearings on S. 1662 before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 97th Cong., at 5 (1981) (statement of Sen. Jackson) (emphasis added) App. 183. This view was echoed by other members of Congress.

III. THE FEDERAL DEFENDANTS' COLLECTION OF FEES FROM PLAINTIFFS FOR A STORAGE FACILITY THAT WAS NOT CONSTRUCTED CONSTITUTES A TAKING

Although Plaintiffs have paid hundreds of millions of dollars to the federal Defendants and received nothing in return, the Courts below ruled that the Plaintiffs had no standing to pursue a takings claim because they do not own the property taken, i.e. the fees paid into the NWF. As discussed above, the federal Defendant's own statements, as well as legislative history of the NWPA, demonstrate that the federal government clearly understood and intended that utility customers, not the utilities themselves, would be paying the required fees into the NWF.

If fact, the plain language of the NWPA distinguishes between who will physically make the payments to the NWF and who will bear the cost. One of the purposes of the Act was:

> To establish a Nuclear Waste Fund, composed of Payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be born by the persons

responsible for generating such waste and spent fuel. 42 U.S.C. § 10131 (b)(4) (emphasis added).

Had Congress intended the generators and owners to bear the costs of disposal, it would not have made this distinction. The persons responsible for generating the waste are the persons who use the energy -- the Plaintiff utility customers. Under the NWPA, they were to be, and have been, paying for disposal of the fuel, despite DOE's abject failure to dispose of it.

Although the monies paid by Plaintiffs to NSP were clearly noted as distinct from the rates they paid for electricity, the District Court erroneously concluded that title to the funds at issue passed to NSP upon the customers' payments to NSP for "electrical service."

There is no question that title to the fees is in Plaintiffs before the fees are collected by NSP. Title to the funds collected by NSP does not pass to NSP upon collection, as NSP is merely a conduit to transfer the fees from the Plaintiffs to DOE. The issue of the title to fees held by an intermediary under a federal statutory scheme was addressed in two cases brought by state agencies for guaranteed student loans against the Department of Education. At issue was the question of whether certain reserves were the property of the conduit state agencies or of the United States. Ohio Student Loan Comm'n v. Cavazos, 900 F.2d 8894, 898-90. (6th Cir. 1990); South Carolina State Education Assistance Auth. v. Cavazos, 897 F.2d 1272, 1276 (4th Cir. 1990). Both the United States Courts of Appeals for the Sixth and Fourth Circuits ruled that title to the funds never passed to the intermediaries.

NSP plays the same role with respect to the customers of NWF funds as the state student loan agencies did in these two cases. NSP merely administers the funds that pass through it to the DOE. This result is consistent with the representations of DOE personnel, utility representatives, and the Minnesota Department of Public Service describing the fee as a "pass-through." See e.g., Smith Testimony, (utilities will be collecting "taxes" for the federal government); Brewer Testimony, (a federal schedule will help the utilities get a "pass through"); App. 201-203.

Krista Sanda, Commissioner of the Department of Public Service in prepared testimony before the House Appropriation Committee, Sub Committee of Energy and Water Development stated "Electric Consumers will not continue quietly pay their money into the NWF and get nothing in return… further… I explained now electricity consumers all pay into NWF". App. 154.

Sanda Appropriations Testimony, (funds are passed through the electric utilities to the government). Because NSP never takes title to these funds, the end result is a direct appropriation by the United States of the Plaintiff's money – a taking. App. 155.

Contractual rights have long been considered "property" subject to taking analysis under the Fifth Amendment. See e.g., Lynch v. United States, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States.") That is, "[r]ights against the United States arising out of a contact with it are protected by the Fifth Amendment." Id. In this case Congress created property rights in Plaintiffs by contracting with NSP to use Plaintiffs' money to fund the NWF.

While a general obligation to pay money to the government in the form of a tax or an assessment does not amount to taking, e.g. Commonwealth Edison Co. v. United States, 46 Fed Cl. 29, 40 (Fed Cl. 2000), the fees Plaintiffs pay into the NWF are not in the nature of a tax or an assessment. Congress placed the financial burden of SNF disposal on nuclear power-supplied customers because they were the beneficiaries of that power. Where Congress has assessed a fee against a particular class of persons or entities that is tied to a particular benefit, as here, a taking can arise if no benefit is received. See United States v. Sperry Corp., 493 U.S. 52, 53 (1989) (no taking occurred because plaintiff received benefit for "user fee"). "A plaintiff seeking to recover under the taking clause must demonstrate that the government has taken and is taking his property and either failed to compensate him justly or failed to put the property to public use." Murray v. United States, 817 F.2d 1580, 1583 (Fed Cir. 1987). Here, the DOE took Plaintiff's money to pay for disposal of SNF and has failed to perform under the clear mandate of its Contracts.

The monetary damages suffered by Plaintiffs and the putative class are the past and future exaction of the 1 mil per kilowatt hour fees paid into the Nuclear Waste Fund and these damages are unique, separate and distinct form any damages suffered by the utility for its stranded and other costs if and when such damages accrued under the terms of the Standard Contract.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, this Court should grant the prayed for Writ in the interest of justice and remand the case to the U.S. District Court with appropriate directions.

Dated this 1st day of October, 2001

COCHRANE & BRESNAHAN P.A.

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 07/06/01

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the

Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payments should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be retrieved by the party that lodged them with this court once the mandate has issued.

JAN HORBALY
Clerk

cc: BRIAN B. O'NEILL
DANA J. MARTIN, TIMOTHY R. THORNTON
ROEDLER V ENERGY, 00-1204
DCT - 98-CV-1843

United States Court of Appeals

for the Federal Circuit

00-1204

PATRICK ROEDLER, THOMAS MCDONOUGH,
JEANNIE STROBEL, RICHARD PALMER,
NOREEN HOFT, and HJ COMPANY,

Plaintiffs-Appellants,

v.

DEPARTMENT OF ENERGY, SECRETARY OF THE
TREASURY, and UNITED STATES,

Defendant-Appellees,

v.

NORTHERN STATES POWER COMPANY,

Defendant-Appellee.

DECIDED: July 6, 2001

Before NEWMAN, MICHEL, and RADER, Circuit Judges.

NEWMAN, Circuit Judge.

The plaintiffs, Patrick Roedler *et al.*, are ratepaying customers for electric power produced from nuclear fuel by Northern States Power Company. The rates paid by these customers include charges that, according to the complaint, are intended to pay for the storage and disposal of spent nuclear fuel and other nuclear waste, pursuant to federal statute and implementing contracts between the United States Department of Energy (DOE) and Northern States Power. The plaintiffs, proposing class action certification, seek recovery from the United States of all or part of the amounts that they paid in accordance with the statute and contracts, based on the established breach of the contracts by the United States. The United States District Court for the District of Minnesota dismissed the complaint, ruling that none of the asserted grounds stated a claim upon which relief could be granted.[1]

BACKGROUND

The Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.*, was enacted "to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel." 42 U.S.C. §10131(b)(2). The Act requires the producers of nuclear-generated power to enter into contractual arrangements with the Department of Energy in accordance with the terms of a Standard Contract,

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[1] Roedler v. Dep't of Energy, No. 98-1843 (D. Minn. Dec. 23, 1999).

10 C.F.R. §961.11, whereby statutory fees are paid by the producers to the Nuclear Waste Fund of the United States Treasury, and the DOE will dispose of their accumulated and future nuclear waste. By statute, and as implemented by the Standard Contract, the DOE agreed to accept this nuclear waste for disposal within fifteen years, that is, by January 31, 1998.

In 1994 the DOE announced that it would not meet the statutory and contractual deadline of January 31, 1998. Notice of Inquiry, 59 Fed. Reg. 27,7007 (1994). This announcement, which has been followed by further delay, led to litigation wherein various power companies sought relief based on the government's non-performance of its contractual obligations. In Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272, 1276 (D.C. Cir. 1996), and Northern States Power Co. v. Department of Energy, 128 F.3d 754, 759 (D.C. Cir. 1997), the District of Columbia Circuit held that the government's failure to meet this deadline was a breach of contract. This ruling led to further litigation in which the utility companies seek damages in the Court of Federal Claims. Appellate rulings on various threshold issues appear at Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336 (Fed. Cir. 2000) and Northern States Power Co. v. United States, 224 F.3d 1361 (Fed. Cir. 2000).

The plaintiffs herein seek to recover from the United States the fees that Northern States Power paid into the Nuclear Waste Fund in accordance with the statute and the contracts between DOE and Northern States Power. The plaintiffs contend that these fee payments should be restored directly to them, lest any recovery by Northern States Power be diverted to benefit the utility's shareholders instead of the ratepayers. The plaintiffs state that with the adjudication by the D.C. Circuit that DOE breached the contracts "the only issue that remains with respect to this breach is who (Northern States Power's shareholders or its customers) is entitled to recover the customers' money."

The fee was set at the rate of 1.0 mil per kilowatt-hour of nuclear-generated power produced starting in 1983, plus a fee for accumulated pre-1983 waste. Northern States Power has paid and apparently continues to pay the fee, as a condition of the continuing operation of its nuclear-fueled electricity generating facilities. The plaintiffs also seek relief from this continuing charge, in view of the government's breach of contract.

The district court held that the plaintiffs do not have an implied-in-fact contract-based claim against the United States, and that they are not third party beneficiaries of the contracts between the Department of Energy and Northern States Power. The court also held that the facts of this case do not support a takings claim under the Fifth Amendment of the Constitution, and that none of plaintiffs' other theories states a claim upon which relief may be granted. The court dismissed the complaint, and this appeal followed.

JURISDICTION

The government and Northern States Power challenge the jurisdiction of both the district court and this court. We conclude that both courts have the requisite jurisdiction.

The plaintiffs' suit was brought in the district court on grounds that included claims under 28 U.S.C. §1346(a)(2), the "Little Tucker Act," which assigns concurrent jurisdiction to the district courts and the Court of Federal Claims for Tucker Act claims that do not exceed $10,000. The plaintiffs represented to the district court that their individual recoveries would be limited to the jurisdictional amount, and on this basis the case proceeded. The district court did not reach how the $10,000 cap would be calculated should the plaintiffs prevail, although this aspect was not free of dispute.

We discern no flaw in this procedure, which accords with precedent. A district court may permit multi-plaintiff Little Tucker Act cases to proceed when each plaintiff waives recovery in excess of $10,000, even when potential liability exceeds $10,000. Saraco v. United States, 61 F.3d 863, 864 (Fed. Cir. 1995). See also, e.g., Smith v. Orr, 855 F.2d 1544, 1552 (Fed. Cir. 1988) (a Little Tucker Act case may proceed in the district court if recovery is limited to $10,000). Thus the district court had jurisdiction of these claims.

The appeal of cases based in whole or in part on the Little Tucker Act, together with any related claims, is assigned exclusively to the Federal Circuit; bifurcation of the appeal, whether based on issues or applicable law, is improper. See United States v. Hohri, 482 U.S. 64, 73-74 (1987) (appeal of a district court decision on claims under the Little Tucker Act and the Federal Tort Claims Act is consigned to the Federal Circuit as to all issues). Thus this appeal is properly before the Federal Circuit.

THE CONTRACT-DERIVED CLAIMS

The plaintiffs argue that they are third party beneficiaries of the contracts between DOE and Northern States Power, and that the district court erred in its contrary ruling.

Third party beneficiaries of a contract to which the United States is a party may assert a claim against the United States, in accordance with the law governing third party claims. Applying the federal common law that governs the contracts of the United States, see United States v. County of Allegheny, 322 U.S. 174, 183 (1944); Fomby-Denson v. Dep't of the Army, 247 F.3d 1366, 1373-74(Fed. Cir. 2001), and taking note that a contract with the United States is to be construed and the rights and duties of the parties determined by application of the same principles of law as if the contract were between private individuals, see Mobil Oil Exploration & Production Southeast, Inc. v. United States, 530 U.S. 604, 608 (2000), we apply the principles of third party beneficiary law as developed in the common law and explained by precedent, see Montana v. United States, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (applying general law of third party beneficiary claims to the United States as a contracting party).

To establish a right of action by a third person who is not a party to or identified in the contract as a beneficiary of its performance, the contract must show the intention of the contracting parties to provide a benefit to that person. See German Alliance Insurance Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912) (the benefit to the third party under the contract must be direct); Caguas Central Federal Savings Bank v. United States, 215 F.3d 1304, 1309 (Fed. Cir. 2000) (the benefit to the third party must be intended by the contract, whether expressly stated or implicit); Montana, 124 F.3d at 1273 (the intended beneficiary need not be specifically identified, but must be in a class clearly intended to be benefitted).

When the intent to benefit the third party is not expressly stated in the contract, evidence thereof may be adduced. For determination of contractual and beneficial intent when, as here, the contract implements a statutory enactment, it is appropriate to inquire into the governing statute and its purpose. See e.g., Rendleman v. Bowen, 860 F.2d 1537, 1541-42 (9th Cir. 1988) (when the contract terms are mandated by Congress, statutory intent is highly relevant to contractual interpretation); American Hosp. Ass'n. v.

Schweiker, 721 F.2d 170, 183 (7th Cir. 1983) (legislative intent is relevant when the contract implements a statute); Busby School of Northern Cheyenne Tribe v. United States, 8 Cl. Ct. 596, 602 (1985) (the court considers statute, regulations, and policy, in determining whether plaintiffs are third party beneficiaries).

The district court observed that neither the Standard Contract nor the Nuclear Waste Policy Act mentions the customer/users of nuclear-generated power as intended direct beneficiaries of these nuclear waste disposal arrangements. The Act describes its purpose as to "provide a reasonable assurance that the public and the environment will be adequately protected" from the hazards of nuclear waste. 42 U.S.C. §10131(b)(1). The preamble of the Standard Contract repeats that the purpose is to protect public health and safety and the environment. 10 C.F.R. §961.11. The district court, reviewing these statements of policy, found that they manifest no intent, either express or implied, to benefit the customer/users of nuclear-generated power other than as members of the general public. The district court reasoned that since the public at large has no right of action under this contract and no entitlement to compensation for its breach by the United States, neither do these plaintiffs.

The plaintiffs do not dispute that there is an important public benefit to nuclear waste disposal. However, the plaintiffs assert that they are not acting as members of the general public. They state that they directly benefit from disposal of the waste produced from the nuclear power generated by Northern States Power, and that their direct interest arises because they, as consumers of this nuclear-generated power, paid the charges assessed against Northern States Power under the DOE contract. They state that this places them in the position of direct and intended beneficiaries of the contract between Northern States Power and the government. The plaintiffs distinguish this action from a suit by members of the public against a private party who contracted with the government to provide services to the public, such as was referred to in Montana, 124 F.3d at 1273 n.6, wherein this court remarked that the failure of a government contractor to provide services does not create a cause of action in members of the public unless they can show a direct right to compensation. The plaintiffs state that since they are not suing as members of the public, it is not relevant whether the contract explicitly grants them a right of enforcement.

The plaintiffs point to the legislative history of the Nuclear Waste Policy Act as showing the understanding of the government and the power companies that the waste disposal fees would be borne by the customer/users of the power. The legislative record supports the position that Congress intended that the nuclear waste disposal costs would be borne by the "beneficiaries" of nuclear power. See e.g., 128 Cong. Rec. 32,556 (1982) (statement of Senator McClure, floor manager, that "this bill for the first time would provide a direct financial linkage between the beneficiaries of nuclear power and the cost for interim management and ultimate disposal for nuclear wastes"). However, the district court did not accept the plaintiffs' position that these relationships converted the nuclear power users into third party beneficiaries of the contracts between DOE and Northern States Power. The district court distinguished between the contractual obligation of the utility company to pay the United States for the disposal of its nuclear-generated waste, and the utility's charges to its customers as users of the power. The court held that the charges to the users did not convert the users into third party beneficiaries, with rights of remedy upon breach by the government.

We agree that the plaintiffs' status as customers and users of the nuclear-generated power does not give them third party beneficiary rights under the utility's contract with the government. The statute places responsibility for payment of the waste disposal fees on "the generators and owners of such waste and spent fuel, that will ensure that the costs of [disposal] will be borne by the persons responsible for generating such waste and spent fuel." 42 U.S.C, §10131(b)(4). The Standard Contract recites that the "costs associated with the ... disposal of SNF [spent nuclear fuel] will be borne by the owners and generators under contract with DOE for disposal services." 10 C.F.R. §961.11. These provisions do not evidence a contractual intent to confer a direct benefit upon the consumers of the power. Although the plaintiffs argue that they directly benefit from continued receipt of nuclear-fueled electric power, whose generation is conditioned on payment of the disposal fees by Northern States Power, that benefit did not cease with the government's breach. We agree with the district court that the plaintiffs have not established a direct and intended benefit sufficient to create a third party right of action against the government.

The plaintiffs also raised before the district court an implied-in-fact contract theory of recovery. An implied-in-fact contract requires a mutual intent to contract including an offer, acceptance, and consideration. See Sommers Oil Co. v. United States, 241 F.3d 1375, 1378 (Fed. Cir. 2001). The district court correctly held that the existence of an express contract between the United States and Northern States Power, establishing their mutual obligations with respect to the fees at issue, negates the existence of an implied-in-fact contract between the United States and the utility's customers on the same subject matter. We agree that the evidence does not support the criteria of an implied-in-fact contract between these plaintiffs and the United States. See e.g., Trauma Services Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (no inference of an intent to be contractually bound).

We affirm that these plaintiffs do not have a Tucker Act claim against the United States.

THE TAKINGS CLAIM

Alternatively, the plaintiffs press the theory that the United States took their property for public use without just compensation, in contravention of the Takings Clause of the Fifth Amendment of the Constitution. The plaintiffs argue that the government's "collection of fees from plaintiffs for a storage facility that was not constructed" constitutes a taking of their property (that is, their money) in that the failure of performance by the government is a failure of just compensation. The plaintiffs refer to the legislative purpose of the Nuclear Waste Policy Act to assess the cost of nuclear waste disposal upon the users of the nuclear-generated power, and state that "Congress created property rights in Plaintiffs by contracting with NSP [Northern States Power] to use Plaintiffs' money to fund the NWF [Nuclear Waste Fund]."

The district court dismissed this claim, ruling that the plaintiffs did not possess a compensable property interest in the payments to the Nuclear Waste Fund for disposal of the utility's nuclear waste and spent fuel. The court concluded that the charge by the utility to the customer/user of the nuclear-generated power, even if the charge served to fund the utility's payment obligation to the United States, was not a taking of property from the customer/user by the United

States. For the purpose of reviewing the dismissal under Fed. R. Civ. P. 12(b)(6) we accept the plaintiffs' premise that their utility charges included the amount of the disposal fee, for the Minnesota Public Utilities Commission authorized the charge. See Leatherman v. Tarrant County, 507 U.S. 163, 164 (1993) (factual allegations of complaint must be accepted); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (all reasonable inferences must be drawn in favor of the claimant).

To support a takings claim under the Fifth Amendment, there must be a legally cognizable property interest. Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1580 (Fed. Cir. 1993). Not every governmental assessment has the potential for generating a compensable taking. United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S.266.281 (1943). The Court explained in Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223-24 (1986) that there is no set formula for identifying a prohibited taking, but that relevant inquiries include the nature of the governmental action, its economic impact, and the extent to which the action "interfered with distinct investment-backed expectations," quoting Penn Central

Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). In United States v. Sperry, 493 U.S. 52 (1989) the Court explained that an assessment of a monetary fee differs from other property for Fifth Amendment purposes:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of Loretto.

Id. at 62. The district court found that the plaintiffs lacked a property interest in these fees.

The parties debate the nature of the plaintiffs' property interest. The government argues that the plaintiffs did not have an "ownership interest" in the money paid into the Nuclear Waste Fund, citing Cavin v. United States, 956 F.2d 1131, 1134 (Fed. Cir. 1992) for the principle that to maintain a takings claim the plaintiff must be the owner of the property at the time of the taking. The plaintiffs point out that money is property and that the fees represent money that belonged to them and was exacted by governmental action, citing United States v. General Motors Corp., 323 U.S. 373, 378 (1945) for the principle that the right of property is the right "to possess, use and dispose of" the thing at issue. The government responds that the plaintiffs "simply paid their monthly electricity bills," providing revenue to the utility company which became the property of the utility.

The district court held that the facts and relationships of this case do not establish a taking of property from these plaintiffs by the United States. The governmental exaction, insofar as these plaintiffs are affected by it, is the assessment (by pass-through from the utility) of the fees to pay for disposal by the United States of the utility's nuclear waste. It is neither a physical invasion of plaintiffs' real or personal property nor an appropriation of the plaintiffs' assets for a use unrelated to the levy. See Sperry, 493 U.S. at 62 (distinguishing a fee for services from a physical occupation); Connelly, 475 U.S. at 226 (the payment of money to fund a reasonable legislative purpose is not a taking).

Plaintiffs do not contest the reasonableness of the assessment; they argue only that it is the government's failure of performance that produced a failure of just compensation. However, constitutional principles are not violated by requiring those benefitting from nuclear-generated power to pay for the disposal of its waste; and it must be recognized that the waste must ultimately be disposed of. The rate of one mil per kilowatt-hour, paid by the consumers for power they actually consumed, is a reasonable economic burden. See Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (the economic burden should bear a reasonable relationship to the societal burden imposed by the governmental action). The problems of disposal of nuclear waste have been present from the inception of nuclear-generated power, and disposal costs have always been part of the cost of power. The ultimate levy of these costs on the consumers of the power does not violate Fifth Amendment principles.

In addition, the plaintiffs' assertion that injury is derived from the government's failure to meet the statutory and contractual deadline does not satisfy the particularized "injury in fact" required to assert a constitutional violation. On somewhat similar facts, the court Ben Oehrleins v. Hennepin County, 115 F.3d 1372, 1379-81 (8th Cir. 1997) held that the customers of waste haulers, who paid passed-through costs to the county and thus suffered indirect economic injury by the county's failure of performance, do not have standing to assert a violation of the Commerce

Clause, although the waste haulers themselves were held to have such standing. This reasoning is similarly applicable to the utility customers herein.

The plaintiffs also argue that since the promised nuclear waste disposal was not provided, the assessment of the fee was a confiscation in terms of Branch v. United States, 69 F.3d 1571, 1576 (Fed. Cir. 1995), wherein the court observed that municipal special assessments may constitute an unlawful taking if there is a flagrant abuse tantamount to a "confiscation of particular property." See Houck v. Little River Drainage Dist., 239 U.S. 254, 264-65 (1915). The government responds that no such abuse here exists, that the nuclear waste still requires disposal to which these fees are committed, and that there has been no confiscation because the fees have not been diverted from their statutory purpose. We agree that this aspect does not establish a confiscation, in the present unresolved posture of nuclear waste disposition.

The plaintiffs also argue that their contract rights were "taken" without just compensation. It is correct that "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.16 (1977). However, in view of our ruling that these plaintiffs have no contract rights, this position can not provide grounds of relief.

The plaintiffs also argue that the collection from them of the statutory/contractual disposal fee by Northern States Power is tantamount to a government imposed payment from one private entity to another without just compensation, also asserted to be barred by the Fifth Amendment. In Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) the Court recognized that a statutorily mandated payment of money between private parties is not necessarily a prohibited taking, but that each case must be decided on its facts. As in Connolly, 475 U.S. at 223, "[g]iven the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another."

On review of the district court's ruling in light of all of the arguments offered,[2] we affirm that these plaintiffs have not established grounds supporting violation of the Fifth Amendment, and that the takings claim was properly dismissed.

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[2] In view of our decision, we do not reach the question of whether the plaintiffs' action is an impermissible challenge to the electric rates approved by the Minnesota Public Utilities Commission in violation of the filed rate doctrine, an issue presented by Northern States Power on

CONCLUSION

The plaintiffs do not have legally cognizable grounds for recovering from the United States the fees that Northern States Power paid into the Nuclear Waste Fund. The dismissal for failure to state a claim on which relief can be granted is affirmed.

AFFIRMED

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this appeal. Nor is it before us to decide whether these plaintiffs have any rights with respect to any recovery from the United States by Northern States Power deriving from the government's breach of contract.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 98-1843 (DWF/AJB)

Patrick Roedler; Thomas McDonough;
Jennie Strobel; Richard Palmer;
Noreen Hoft; and HJ Company,

Plaintiffs,

MEMORANDUM OPINION AND ORDER

v.

United States Department of Energy; the
Secretary of the Treasury of the United
States; and the United States of America,

Defendants,

and

Northern States Power Company,

Nominal Defendant.

John A. Cochrane, Esq., Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, Minnesota 55101; Brian B. O'Neill, Esq. Elizabeth H. Schmiessing, Esq., Faegre & Benson, 90 South Seventh Street, Suite 2200, Minneapolis, Minnesota 55402; and Rodney A. Wilson, Esq., Wilson Law

Office, 701 Fourth Avenue South, Suite 500, Minneapolis, Minnesota 55415, for Plaintiffs.

Jack Kaufman, Esq., United States Department of Justice, P.O. Box 875, Ben Franklin Station, Washington, D.C. 20044, for Defendants United States Department of Energy, the Secretary of the Treasury of the United States, and the United States of America.

Timothy R. Thornton, Esq., Briggs & Morgan, 90 South Eighth Street, Suite 2400, Minneapolis, Minnesota 55402, for Nominal Defendant Northern States Power Company.

Julia E. Anderson, Assistant Attorney General, Minnesota Attorney General's Office, 445 Minnesota Street, St. Paul, Minnesota 55101, for Amici Minnesota Public Utilities Commission and Minnesota Department of Public Service.

Introduction

This case arises under the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C.A. §10101, *et seq.* Specifically, the lawsuit focuses on a contract between Defendant United States Department of Energy ("DOE") and Nominal Defendant Northern States Power Company ("NSP"), under which DOE is obligated to dispose of NSP's spent nuclear fuel in exchange for fees paid by NSP to DOE. The Plaintiffs and putative class members are ratepayers of NSP who allege that they are entitled to damages and other equitable relief from DOE, the Secretary of the Treasury of the United States, and the United States of America (collectively, the "Federal Defendants") for DOE's breach of the contract.

The matter is currently before the Court on the Federal Defendants' Motion to Dismiss the Plaintiffs' Complaint and NSP's Motion to Dismiss the Plaintiffs' Complaint or for Summary Judgment. Due to the status of discovery, a motion for summary judgment is premature, and the motions to dismiss the Plaintiffs' Complaint will be treated as motions to dismiss. The matter is also before the Court pursuant to the Federal Defendants' Motion to Dismiss NSP's Crossclaim. NSP concedes that if the Plaintiffs' Complaint is dismissed, then NSP's Crossclaim is moot.

The Minnesota Public Utilities Commission ("MPUC") and the Minnesota Department of Public Service (collectively, the "State Agencies") filed a joint amici brief in support of the Defendants' motions to dismiss. The State Agencies request that the Court dismiss the Plaintiffs' lawsuit in deference to the MPUC's jurisdiction over the rates charged by NSP and in recognition of and deference to the ability of the State Agencies to protect ratepayers' interests.

For the reasons stated below, the Court does not have subject matter jurisdiction over the present litigation, and the Plaintiffs otherwise fail to state a claim for which relief may be granted. Therefore, the Federal Defendants' and NSP's Motions to Dismiss are granted. NSP's Crossclaim is thus moot and is dismissed also.

Background

In 1982, Congress enacted the NWPA to protect the public health and the environment from the potential risks associated with radioactive waste. 42 U.S.C.A. § 10131(a). The NWPA assigns to the federal government the responsibility to provide for the permanent disposal of spent nuclear fuel, and it directs that "the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C. §10131(a)(4). Northern States Power Company v. United States, 43 Fed. Cl. 374, 376 (Fed. Cl. 1999). The NWPA provides that the generators and owners of spent nuclear fuel have the responsibility to provide for and pay the costs of the interim storage of the spent nuclear fuel until the waste is accepted by DOE. 42 U.S.C.A. § 10131(a)(5).

The NWPA authorized DOE to enter into contracts with owners and generators of spent nuclear fuel, pursuant to which DOE is to accept and dispose of the spent nuclear fuel in exchange for the payment of fees from the owners and generators. 42 U.S.C.A. § 10222(a)(1). DOE regulations set forth a "Standard Contract" form to be used by DOE in entering into these contracts: 10 C.F.R. § 961.11. Under the contracts, the owners and generators are to pay statutorily imposed fees to DOE, in return for which DOE would dispose of the spent nuclear fuel, "beginning not later than January 31, 1998." 42 U.S.C.A. § 10222(a)(5)(b).

The NWPA also established the Nuclear Waste Fund ("NWF"), "composed of payments made by the generators and owners of such waste and spent fuel." 42 U.S.C.A. §§ 10131(b)(4), 10222(c). The Secretary of the Treasury is the custodian of the NWF. 42 U.S.C.A. § 10222(c). The NWPA specifies that expenditures may only be made from the NWF for administrative and operation purposes having a direct bearing upon radioactive waste disposal activities. 42

U.S.C.A. § 10222(d). The Plaintiffs allege that DOE has earned interest on the funds in the NWF from their placement in interest-bearing accounts by the United States Treasury and that NSP's payments alone have earned over $90 million in interest through 1997. (Complaint at ¶ 48.)

In June of 1983, DOE executed three virtually identical contracts with NSP (collectively, the "NSP Standard Contract") for the disposal of NSP's spent nuclear fuel, using the Standard Contract form set forth in 10 C.F.R. § 961.11. (Complaint at ¶ 12.) Article VIII of the NSP Standard Contract requires NSP, as "Purchaser," to pay DOE 1.0 mill per kWh of energy generated by nuclear means by the facility named in the contract. The 1.0 mill per kWh fee was statutorily mandated by the NWPA. 42 U.S.C.A. § 10222(a)(2). NSP funds this fee through a line item charge on its ratepayers' monthly electricity bills. (Complaint at ¶ 47.)

DOE failed to begin accepting the spent nuclear fuel by January 31, 1998, and as yet, has not begun accepting any spent nuclear fuel. (Complaint at ¶ 40.)

DOE's breach has already been judicially determined in two cases brought under the NWPA. In 1995, DOE published a Notice in the Federal Register, setting forth its conclusion that it did not have an obligation to begin accepting spent nuclear fuel for disposal beginning January 31, 1998, absent the existence of a repository or interim storage facility by that date. 60 Fed. Reg. 21793 (May 3, 1995).

The United States Court of Appeals for the District of Columbia Circuit disagreed, holding that the NWPA created an unconditional obligation in DOE, reciprocal to the utilities' obligation to pay the fees into the NWF, to start disposing of the spent nuclear fuel no later than January 31, 1998. Indiana Michigan Power Co. v. Dept of Energy, 88 F.3d 1272, 1276 (D.C. Cir. 1996). The Court of Appeals held that a determination of the appropriate remedy was premature at that time, however, as DOE had not yet defaulted upon its statutory or contractual obligations. Indiana Michigan, 88 F.3d at 1277.

Following the Indiana Michigan decision, various state regulatory agencies and utilities, including NSP, petitioned the court for a writ of mandamus requiring DOE to begin disposing of the spent nuclear fuel by the statutory and contractual deadline of January 31, 1998. While the

Court of Appeals reaffirmed that DOE had a clear duty to act and the petitioners had a clear right to relief, the Court of Appeals declined to issue the broad writ of mandamus sought because the petitioners had an adequate remedy under the Standard Contracts. Northern States Power Co. v. United States Dept. of Energy, 128 F.3d 754, 759 (D.C. Cir. 1997).

On June 6, 1998, prior to the Plaintiffs' filing of this lawsuit, NSP filed a complaint in the United States Court of Federal Claims against the United States, seeking monetary relief for the 'United States' breach of the NSP Standard Contract. Northern States Power Co. v. United States, 98-484C (Fed. Cl.). On April 6, 1999, the Court of Federal Claims granted the United States' motion to dismiss for failure to exhaust the administrative remedies set forth in the NSP Standard Contract. Northern States Power Co. v. United States, 43 Fed. Cl. 374, 388 (1999).

On August 7, 1998, the Plaintiffs commenced the present litigation. The Plaintiffs and putative class members are utility customers, or ratepayers, of NSP. (Complaint at ¶ 14.) The Plaintiffs' Complaint is set forth as follows: Count One, Breach of Contract; Count Two, Breach of Implied Contract; Count Three, Taking, Pursuant to the Tucker Act;

Count Four, Unjust Enrichment; Count Five, Fifth Amendment Taking and Due Process; and Count Six, Declaration of NSP's Interest, seeking a declaration that NSP has no title to the funds it has collected from the Plaintiffs and an injunction against further collections.

The Plaintiffs do not allege any wrongdoing by NSP and seek no monetary relief against NSP, but rather have named NSP as a "Nominal Defendant."

Discussion

A. Standard of Review

In the present matter, the Federal Defendants have moved for dismissal, while NSP has moved for dismissal or, in the alternative, for summary judgment. The Plaintiffs argue that NSP's motion is properly considered as a motion for summary judgment, due to the parties' introduction of matters outside the pleading. The Plaintiffs further argue that consideration of a summary judgment motion would be premature, due to the status of discovery.

The Court agrees that a motion for summary judgment is premature. However, the Court finds that the matter is capable of resolution as a motion to dismiss.

The Defendants move for dismissal pursuant to both Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

Dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) will not be granted lightly. Wheeler v. St. Louis Southwestern Ry. Co., 90 F.3d 327, 329 (8th Cir. 1996), citing Bowe v. Northwest Airlines, Inc., 974 F.2d 101, 103 (8th Cir. 1992), cert. denied, 507 U.S. 992, 113 S. Ct. 1602, 123 L. Ed. 2d 164 (1993). Dismissal is proper, however, where an attack on the complaint's alleged basis for subject matter jurisdiction reveals that there is no actual basis for jurisdiction. Wheeler, 90 F.3d at 329, citing Bowe, 974 F.2d at 103.

The district court has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1). Osborn v. U.S., 918 F.2d 724, 728 n.4 (8th Cir. 1990), citing Land v. Dollar, 330 U.S. 731, 735 & n.4, 67 S. Ct. 1009, 1011 & n.4, 91 L. Ed. 1209 (1947). Consideration of matters outside the pleadings under such circumstances does not convert the proceedings to a Rule 56 summary judgment motion. Osborn, 918 F.2d at 729.

A complaint shall be dismissed for failure to state a claim under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would demonstrate an entitlement to relief. Springdale Educ. Assn. v. Springdale School Dist., 133 F.3d 649, 651 (8th Cir. 1998); Parns v. Gateway 2000, Inc., 122 F.3d 539, 545 (8th Cir. 1997), citing Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982). Dismissal is proper only when the complaint on its face reveals "some insuperable bar to relief." Duffy v. Landberg, 133 F.3d 1120, 1122 (8th Cir. 1998), quoting Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995).

The allegations in the complaint must be treated as true and must be construed in the plaintiff's favor. Duffy, 133 F.3d at 1122. However, conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim. Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998).

In deciding a motion to dismiss under Rule 12(b)(6), the court may consider matters of public record. Sebastain v. U.S., 185 F.3d 1368, 1374 (Fed. Cir. 1999). In addition, the court may generally consider documents integral to the complaint and upon which the complaint relies, even when not attached to the complaint and produced instead by the defendant in support of a motion to dismiss. Brogren v. Pohlad, 933 F. Supp. 793, 798 (D. Minn. 1995). In the present matter, the NSP Standard Contract is referenced in the Complaint and is integral to and provides the basis of the Plaintiffs' claims. The Court may therefore consider the NSP Standard Contract and matters of public record without converting the present motions to dismiss into motions for summary judgment.

B. Sovereign Immunity and Subject Matter Jurisdiction

Under the doctrine of sovereign immunity, the United States is immune from suit unless it consents to be sued. Miller v. Tony and Susan Alamo Foundation, 134 F.3d 910, 915, (8th Cir. 1998). Waivers of the federal government's sovereign immunity must be unequivocally expressed in statutory text. Miller, 134 F.3d at 915. The United States' consent to be sued must be strictly construed in favor of the sovereign. U.S. v. Nordic Village. Inc., 503 U.S. 30, 34, 112 S. Ct. 1011, 1014-15, 117 L. Ed. 2d 181 (1992). In the absence of a waiver of sovereign immunity, the court lacks subject matter jurisdiction. F.D.I.C. v. Meyer, 510 U.S. 471, 475, 114 S. Ct. 996, 1000, 127 L. Ed. 2d 308 (1994); Miller, 916 F.3d at 915-16.

In the present matter, the Plaintiffs pursue their contract and taking, claims, set forth in Counts One, Two, Three, and Five, under the Tucker Act, 28 U.S.C.A. § 1346(a)(2). The Plaintiffs seek to pursue their due process claim under Section 702 of the Administrative Procedure Act, 5 U.S.C.A. § 702. In addition, the Plaintiffs seek injunctive and declaratory relief, set forth in Count Six, under the Declaratory Judgment Act, 28 U.S.C.A. §§ 2201-02, and the All Writs Act, 28 U.S.C.A. § 1651. The Plaintiffs have conceded to dismissal of Count Four, Unjust Enrichment. (Pl. Mem. in Opp., p. 45, n.19.)

The Tucker Act provides that the district courts shall have jurisdiction over any "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . ."28 U.S.C.A. §

1346(a)(2).[1] In the present matter, the Plaintiffs seek monetary damages for breach of contract, breach of implied contract, and for unlawful taking under the Fifth Amendment.

C. Count One: Breach of Contract

The Tucker Act provides a basis for jurisdiction in the district courts for breach of contract claims under $10,000. 28 U.S.C.A. § 1346(a)(2). Ysasi v. Rivkind, 856 F.2d 1520, 1525 (Fed. Cir. 1988). The Tucker Act also extends its grant of jurisdiction to claims brought by plaintiffs who are not named parties to, but rather are intended third party beneficiaries of government contracts. Carlow v. United States, 40 Fed. Cl. 773, 779 (Fed. Cl. 1998). In the present matter, the Plaintiffs claim that they are intended third party beneficiaries of the NSP Standard Contract.

1. Third Party Beneficiaries

The test for determining an intended third party beneficiary status is that the contract must reflect the express or implied intention of the parties to benefit the third party. Montana v. United States, 124 F.3d 1269, 1273 (Fed. Cir. 1997). The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefitted thereby. Montana, 124 F.3d at 1273. The test is premised upon the decision of the United States Supreme Court, which held that "[b]efore a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. Carlow, 40 Fed. Cl. at 781, quoting German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230, 33 S. Ct. 32, 35, 57 L. Ed. 195 (1912).

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[1] As the Tucker Act waives sovereign immunity only for claims "against the Untied States," the Plaintiffs' claims under the Tucker Act may not proceed against DOE or the Secretary of the Treasury of the United States.

When construing the intended benefit pursuant to it contract based on a federal statute, the court should look to the pertinent statutes and regulations and the underlying policy behind the contracts and applicable statutes and regulations. See Busby School of Northern Cheyenne Tribe v. U.S., 8 Cl. Ct. 596, 602 (Cl. Ct. 1985) ("the plaintiffs in question may very well be able to show they were intended third-party beneficiaries of the contracts between the School Board and the BIA given the pertinent statutes and regulations and the underlying policy behind the contracts and applicable statutes and regulations").

In the present matter, not only is the NSP Standard Contract itself lacking in any mention of ratepayers such as the Plaintiffs, but the statute and regulations in question are similarly devoid of any reference to ratepayers as an intended beneficiary. Instead, the NSP Standard Contract and the NWPA, with its accompanying regulations, refer only to intended obligations and benefits between DOE and the owners and generators of spent nuclear fuel, and to an intention to benefit and protect the general public welfare and the environment.

The NWPA contains an explicit statement of its purposes. 42 U.S.C.A. § 10131(b). Included in its purposes is "a reasonable, assurance that *the public and the environment* will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel . . ." 42 U.S.C.A. § 10131(b)(1)(emphasis added). The NWPA further specifics that "the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C.A. § 10131(a)(4).

In accordance with its purposes, the NWPA authorized DOE "to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel," such as NSP. 42 U.S.C.A. § 10222(a). The NWPA further authorized DOE to establish procedures for the collection and payment of fees from the generators and owners of the spent nuclear fuel. 42 U.S.C.A. § 10222(a)(4). The NWPA does not authorize DOE to contract with ratepayers such as the Plaintiffs in any capacity.

The funds at issue in the present matter, contained in the NWF, are explicitly described in the NWPA as being "composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel." 42 U.S.C.A. §§ 10131(b)(4). The NWPA specified that the fees and funds at issue are generated from utilities such as NSP, not from ratepayers such as the Plaintiffs.

In summary, the purpose of the NWPA is explicitly set forth as an intent to benefit and protect the public welfare and the environment. The NWPA and the corresponding regulations consistently and explicitly emphasize that the NWF fees will be paid by and the full costs of disposal will be borne by the owners and generators of the spent nuclear fuel. Ratepayers, such as the Plaintiffs, are not referenced in the statute or its accompanying regulations, either in regard to the benefits or the obligations contained in the NWPA.

Similarly, the NSP Standard Contract, entered into pursuant to the NWPA, is explicitly between DOE and NSP only; the ratepayers are not referenced, either in regards to the benefits or the obligations at issue. The preamble of the NSP Standard Contract reads as follows:

> Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors *in order to protect the public health and safety, and the environment;*
>
> . . .
>
> Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste;
>
> . . .

(NSP Standard Contract, p. 1.)

The NSP Standard Contract sets forth, in Article VIII, that NSP, as "Purchaser," is required to pay DOE a fee of 1.0 mill per kWh on electricity. The NSP Standard Contract charges fees only to NSP and to no other person or entity. In exchange for payment of the fee, Article IV sets forth that DOE will accept title to NSP's spent nuclear fuel.

Finally Section XXII of the NSP Standard Contract contains an integration clause, which states that the contract "contains the entire agreements between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract."

Neither the NWPA nor the NSP Standard Contract reflects the express or implied intention to benefit the ratepayers as third parties. Rather, the statute and the contract explicitly contemplate that the parties' mutual obligations were entered into so as to benefit the general public as a whole.

The Plaintiffs cite to the legislative history in an attempt to create a question as to Congress' intent to benefit the ratepayers. However, where the resolution of a question of federal law turns on a statute and the intention of Congress, the court must first look to the statutory language. Toibb v. Radloff, 501 U.S. 157, 162, 111 S. Ct. 2197, 2200, 115 L. Ed. 2d 145 (1991). The court will then look to the legislative history if the statutory language is unclear; however, if the statutory language is not unclear, there is no need to look at the legislative history. Toibb, 501 U.S. at 162, 111 S. Ct. at 2200. The Court has looked to the explicit language of the NWPA and has found no such intention to benefit the ratepayers specifically. There is consequently no need to look at legislative history so as to create an ambiguity that does not otherwise exist.

Similarly, the Plaintiffs also cite to public statements by NSP in an attempt to create a question about the parties' intent to benefit ratepayers under the NSP Standard Contract. However, a court's interpretation of a contract begins with the contract's plain language. McAbee Construction, Inc. v. United States, 97 F.3d 1431, 1435 (8th Cir. 1996). If the provisions are clear and unambiguous, they must be given their plain and ordinary meaning, and the court may not resort to extrinsic evidence to interpret them. McAbee, 97

F.3d at 1435. Extrinsic evidence will not be received to change the terms of a contract that is clear on its face. McAbee, 97 F.3d at 1435, quoting Beta Sys., Inc. v. United States, 838 F.2d 1179, 1183 (Fed. Cir. 1998). The Court examined the language of the NSP Standard Contract and found no ambiguity that would require the introduction of extrinsic evidence. The Plaintiffs were not intended third party beneficiaries of the NSP Standard Contract.

As discussed above, the general rule for determining whether a plaintiff is an intended third party beneficiary is whether the contract reflects the express or implied intention of the parties to benefit the third party. Montana, 124 F.3d at 1273. However, under certain limited circumstances, the third party beneficiary test has a second prong.[2] Schuerman v. U.S., 30 Fed. Cl. 420, 430 (Fed. Cl. 1994); Montana, 124 F.3d at 1273, n.6. The second prong of the third party beneficiary test applies in cases in which members of the public bring suit against promisors who contract with the government to render a public service or, in other words, in cases of general government contracts benefitting the public at large. Schuerman, 30 Fed. Cl. at 430; Montana, 124 F.3d at 1273, n.6. In such cases, the third party beneficiary test requires direct evidence in the contract that the contracting parties intended to give the third party an enforceable right to sue for compensation. Schuerman, 30 Fed. Cl. at 430; Montana, 124 F.3d at 1273, n.6.

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[2] The second prong was rejected as per se requirement of third party beneficiary status, and currently only applies under limited circumstances. Carlow, 40 Fed. Cl. at 781; Schuerman, 30 Fed. Cl. at 430; Montana, 124 F.3d at 1273 n.6.

In the present matter, the NSP Standard Contract is a government contract benefitting the public at large, as discussed above. Therefore, the second prong of the third party beneficiary test applies. The NSP Standard Contract must contain direct evidence that NSP and DOE intended to give the Plaintiff ratepayers an enforceable right to sue for compensation. There can be no question that the Plaintiffs fail to meet this test as a matter of law.

The Plaintiffs fail to meet either prong of the third party beneficiary test as a matter of law. Therefore, regardless of whether one or both prongs of the test are applied, the Plaintiffs are not third party beneficiaries of the NSP Standard Contract.

The Plaintiffs consequently fail to state a claim for breach of contract. In addition, because the Plaintiffs cannot sue under the NSP Standard Contract, there is no jurisdiction for breach of contract under the Tucker Act. Therefore, this Court does not have subject matter jurisdiction over the Plaintiffs' breach of contract claim and the claim must be dismissed.

2. Exhaustion of Administrative Remedies

In the alternative, the Plaintiffs' breach of contract claim must also be dismissed for failure to exhaust administrative remedies. The Plaintiffs allege that they are third party beneficiaries under the NSP Standard Contract. (Complaint at ¶ 65.) The Court has already found that the Plaintiffs' allegation is erroneous as a matter of law. However, even if the Plaintiffs were third party beneficiaries under the Standard Contract, this Court would have to dismiss their claim of breach of contract for failure to exhaust administrative remedies.

A third party beneficiary is bound by the terms of the contract and is subject to the same defenses as the original party would be. Robbins v. Prosser's Moving and Storage Co., 700 F.2d 433, 436 (8th Cir. 1983). In the present matter, Article XVI of the NSP Standard Contract provides that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer," whose decision shall be final and conclusive unless appealed to the DOE Board of Contract Appeals within 90 days. (NSP Standard Contract, p. 27; 10 C.F.R. § 961.11, Article XVI.)

The Court of Federal Claims cited to this language in the NSP Standard Contract in dismissing NSP's lawsuit against the United States; the Court held that NSP was required to pursue its claims through the administrative remedies established in the NSP Standard Contract. Northern States Power Co. v. United States, 43 Fed. Cl. at 382, 388. As a third party beneficiary, the Plaintiffs would be subject to the same defense in this lawsuit. Therefore, even if the Plaintiffs' claim of third party beneficiaries status under the NSP Standard Contract was not erroneous as a matter of law, their breach of contract claim would still have to be dismissed for failure to exhaust administrative remedies.

C. Count Two: Breach of Implied Contract

In Count Two, the Plaintiffs allege that they are parties to an implied contract with DOE pursuant to the 1.0 mill per kWh fee paid into the NWF. (Complaint at ¶ 67.) In their Response Brief, the Plaintiffs specified that their breach of implied contract claim is based upon all implied-in-fact contract theory, and they are not pursuing their claim based upon an implied-in-law contract theory. (Pl. Mem. in Opp., p. 45, n.19.) However, the Plaintiffs cannot set forth an entitlement to relief as a matter of law.

First, the existence of an express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract. Atlas Corp. v. United States, 895 F.2d 745, 754 (Fed. Cir. 1990), cert. denied, 498 U.S. 811, 111 S. Ct. 46, 112 L. Ed. 2d 22, citing ITT Fed. Support Services v. United States, 531 F.2d 522, 528, n.12, 209 Ct. Cl. 157 (1976). In the present matter, the rights and duties in question, specifically, the payment of fees to DOE and DOE's corresponding obligation to accept spent nuclear fuel, are explicitly set forth in the NSP Standard Contract. Because the NSP Standard Contract already encompasses the subject matter of the Plaintiffs' claims, the Plaintiffs' breach of implied contract cause of action fails to state a claim as a matter of law.

In the alternative, the Plaintiffs cannot establish the elements of an implied contract as a matter of law. An implied-in-fact contract is one founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. Lewis v. United States, 70 F.3d 597, 600 (Fed. Cir. 1995), quoting Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597, 43 S. Ct. 425, 426-27, 67 L. Ed. 816 (1923). Like an express contract, an implied-in-fact contract requires: (1) mutuality of intent to contract; (2) consideration, and (3) lack of ambiguity in offer and acceptance. Lewis, 70 F.3d at 600, quoting City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990). cert. denied, 501 U.S. 1230, 111 S. Ct. 2851, 115 L. Ed. 2d 1019. When the United States is a party, a fourth requirement is added: the government representative whose conduct is relied upon must have actual authority to bind the government in contract. Lewis, 70 F.3d at 600, quoting City of El Centro, 922 F.2d at 820.

In the present matter, the Plaintiffs have failed to allege mutuality of intent to contract and lack of ambiguity in offer and acceptance. Rather, the Plaintiffs' Complaint, including the NSP Standard Contract, and the NWPA establish that DOE and NSP contracted with each other for NSP's payment of fees to DOE in exchange for DOE's disposal of spent nuclear fuel.

In addition, the Plaintiffs cannot as a matter of law satisfy the fourth required element of an implied-in-fact, that of actual authority by the government representative in question. The NWPA authorized DOE to contract "with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, 42 U.S.C.A. § 10222(a)(1). DOE thus had actual authority to enter into contracts with utilities such as NSP. The Plaintiffs cannot as a matter of law establish that DOE had actual authority to contract with ratepayers such as the Plaintiffs for the disposal of spent nuclear fuel. The Plaintiffs' inability to establish actual authority to contract by DOE serves as an insuperable bar to relief in the present matter.

Count Two, breach of implied contract, thus fails to state a claim as a matter of law. Furthermore, without the existence of an implied contract, this Court lacks subject matter jurisdiction under the Tucker Act. Count Two must consequently be dismissed.

D. Count Three and Count Five; Taking and Violation of Due Process

In Count Three, the Plaintiffs assert that "DOE's actions constitute a taking without just compensation, and therefore compensation is available under the Tucker Act, . . ." (Complaint at ¶ 69.) However, the Tucker Act is only a jurisdictional statute; it does not create any substantive rights. Tippett v. United States, 185 F.3d 1250, 1254 (Fed. Cir. 1999), citing United States v. Testan, 424 U.S. 392, 398, 96 S. C1. 948, 953, 47 L. Ed. 2d 114 (1976).

In Count Five, the Plaintiffs' assert that "DOE's actions constitute a taking of plaintiffs' and putative class members' property without due process of law, . . ." pursuant to the Fifth Amendment. (Complaint at ¶ 73.) Therefore, the Court will assume that the Plaintiffs intend to assert both a due process and a taking claim under the Fifth Amendment.

1. Taking under the Fifth Amendment

Pursuant to a taking claim under the Fifth Amendment, a plaintiff must initially show standing. Maniere v. United States, 31 Fed. Cl. 410, 420 (Fed. Cl.

1994). Standing is the constitutional requirement, imposed by the "cases or controversies" provision of Article 111, that a plaintiff must allege a judicially cognizable and redressable injury in order to pursue a lawsuit. Ben Ochrleins v. Hennepin County, 115 F.3d 1372, 1378 (8th Cir. 1997).

To establish standing pursuant to a taking claim, the plaintiff must show proof of personal injury, that is, the requisite interest in the property at issue and the deprivation thereof by the United States. Maniere, 31 Fed. Cl. at 420. Accordingly, to demonstrate the requisite interest in the property at issue, the plaintiff must demonstrate ownership of the property at the time of the taking. Maniere, 31 Fed. Cl. at 420. If the plaintiff fails to establish this most basic requirement of the personal injury component of the standing analysis, a court need not progress to the other considerations of standing. Maniere, 31 Fed. Cl. at 420.

The Plaintiffs cannot demonstrate ownership of the property at issue, which are the fees that NSP paid into the NWF, and thus have no standing to pursue a taking claim. The Plaintiffs concede that they simply paid their monthly electricity bills. Revenue paid by the customers for service belongs to the company. Board of Public Utility v. New

York Telephone Co., 271 U.S. 23, 31, 46 S. Ct. 363, 366, 70 L. Ed. 808 (1926). By paying bills for service, customers do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Board of Public Utility, 271 U.S. at 32, 46 S. Ct. 366. The Plaintiffs in the present matter pay a fee for utility service, including the storage and disposal of spent nuclear fuel. The Plaintiffs thus do not retain an interest in the fee after it is paid to NSP. The Plaintiffs therefore lack standing to assert a taking claim. See also Ben Oehrleins, 115 F.3d at 1379-81 (no standing for customers based upon paying the fees in question through passed-on costs).

The Plaintiffs respond in the present matter by arguing that the fees paid into the NWF are not merely passed on to customers through increased utility bills, but rather, "the Plaintiffs here actually pay the fees in question tot he United States, albeit *through the agency* of NSP. (Pl. Mem. in Opp., p. 25 (emphasis added).) The Plaintiffs thus argue that "NSP effectively acted as DOE's agent with respect to collection of the NWF fees." (Pl. Mem. in Opp., p. 51.) The Plaintiffs argue that "NSP had *apparent* *authority* to act as DOE's agent." (Pl. Mem. in Opp., p. 51 (emphasis added).)

However, "[i]t is well established that the government is not bound by the acts of its agents beyond the scope of their *actual authority*. Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1432 (Fed. Cir. 1998) (emphasis added), citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384, 68 S. Ct. 1, 3, 92 L. Ed. 10 (1947). The Plaintiffs do not allege, and cannot as a matter of law establish, that NSP had actual authority to collect fees as DOE's agent.

Therefore, because the Plaintiffs cannot establish that they had the required ownership interest in the fees at the time that they were collected by DOE into the NWF, the Plaintiffs have no standing to pursue their takings claim.

In the alternative, even if the Plaintiffs had standing to pursue a taking claim based upon the NSP's payment of fees into the NWF, the Plaintiffs' taking claim would still be barred.

A compensable taking arises only if the government action in question is authorized. Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir. 1998), citing, United States v. North Am. Transp. & Trading Co., 253 U.S. 330, 333, 40 S. Ct. 518, 64 L. Ed. 935 (1920). If the government action is unauthorized, the acts of the government's officers may be enjoinable, but they do not constitute the basis of a taking claim. Del-Rio, 146 F.3d at 1362. The principle underlying this rule is that when a government official engages in ultra vires conduct, the official will not, in any legal or constitutional sense, represent the United States, and what the official does or omits to do, without the *authority of Congress*, cannot create a claim against the government founded upon the Constitution. Del-rio, 146 F.3d at 1362 (emphasis added), citing Hooe v. United States, 218 U.S. 322, 31 S. Ct. 85, 54 L. Ed. 1055 (1910).

In the present matter, the NWPA authorized DOE to contract with NSP for the disposal of spent nuclear fuel in exchange for NSP's payment of fees. 42 U.S.C.A. § 10222(a)(1). DOE had no such "authority of Congress" to take any such fees from the Plaintiffs. Therefore, in the absence of the required "authority of Congress," the DOE's collection of fees from the Plaintiffs would be ultra vires, and thus could not form the basis of a taking claim.

2. Due Process

In Count Five, the Plaintiffs allege that the assessment of fees violates due process under the Fifth Amendment. (Complaint at ¶ 73.) However, the due process clause of the Constitution is not a money-mandating provision such as is required for jurisdiction to lie under the Tucker Act. Golden Pacific Bankcorp v. United States, 15 F.3d 1066, 1076 (Fed. Cir. 1994). The Plaintiffs concede that their due process claim is not cognizable under the Tucker Act. (Pl. Mem. in Opp., pp. 53-54.)

The Plaintiffs seek instead to pursue their due process claim under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C.A. § 702, which was not pled in their Complaint. The Plaintiffs thus move the Court to allow them to amend their Complaint accordingly.

However, the Plaintiffs' due process allegation otherwise fails to state a claim for relief. The due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action. O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 789, 100 S. C1. 2467, 2476, 65 L. Ed. 2d 506 (1980). The provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. O'Bannon, 447 U.S. at 789, 100 S. Ct. at 2476. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. O'Bannon, 447 U.S. at 789, 100 S. Ct. at 2476.

As the Court addressed earlier, the government did not directly appropriate any funds from the Plaintiffs, only from NSP. Any allegation by the Plaintiffs that DOE directly assessed fees against the Plaintiffs is erroneous as a matter of law. Therefore, the Plaintiffs' allegations fail to state a claim for violation of due process.

In addition, as the second element of a due process claim, after demonstrating that the plaintiff has a protected liberty or property interest at stake, the plaintiff must prove that the defendant deprived him or her of such an interest without due process of law. Gordon v. Hansen, 169 F.2d 1109, 1114 (8th Cir. 1999). Due process requires adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Marler v. Missouri State Board of Optometry, 102 F.3d 1453, 1456 (8th Cir. 1996), quoting Post v. Harper, 990 F.2d 491, 493 (8th Cir.1992). In the present matter, the Plaintiffs have not alleged that the government deprived them of notice or an opportunity to be heard. Thus the Plaintiffs have not set forth a claim that they were deprived of due process of law under the Fifth Amendment. Finally, it is well established that a simple breach of contract does not rise to the level of a constitutional deprivation. Dover Elevator Co. v. Arkansas State Univ., 64 F.3d 442, 446 (8th Cir. 1995) (due process claim under § 1983 and Fourteenth Amendment). In the present matter, the Plaintiffs' due process allegation is based upon DOE's breach of the NSP Standard Contract. The Plaintiffs have alleged no additional facts that would give rise to a due process claim. The Plaintiffs' allegation therefore does not state a claim for a violation of due process.

For the above reasons, the Plaintiffs' allegations are insufficient to set forth a claim either for taking or for violation of due process under the Fifth Amendment.

Therefore, Count Three and Count Five must be dismissed as a matter of law.[3]

3. Statute of Limitations

In the alternative, even if the Plaintiffs' taking and due process allegations stated a claim for relief, the Plaintiffs' claims would still be barred by the statute of limitations.

The NWPA contains a statute of limitations as follows:

> A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

42 U.S.C.A. § 10139(c).

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[3] The Plaintiffs' motion oto amend the Complaint to plead their due process claim under the APA is consequently denied as moot and untimely.

Subsection (a)(1), as referenced above, includes any civil action "challenging the constitutionality of any decision made, or action taken, under any provision of this part." 42 U.S.C.A. § 10139(a)(1)(C).[4] In Count Three and Count Five, the Plaintiffs allege that DOE's collection of fees pursuant to the NWPA, 42 U.S.C.A. § 10222(a), constitutes a taking and a violation of due process under the Fifth Amendment, in the context of DOE's failure to fulfill its corresponding obligation to begin accepting spent nuclear fuel by January 31, 1998.

Therefore, as the Plaintiffs seek to challenge the constitutionality of DOE's action taken under the NWPA, the Plaintiffs' claims are subject to the 180 day statute of limitations set forth above. DOE failed to fulfill its obligation to begin accepting spent nuclear fuel by January 31, 1998. (Complaint at ¶ 40.) The Plaintiffs commenced the present action on August 7, 1998, thereby filing their action after the limitations period had run.

E. Count Four: Unjust Enrichment

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[4] The statute also provides that the Untied States courts of appeals shall have original and exclusive jurisdiction over any such action. 42 U.S.C.A. § 10139(a)(1). The provision thereby provides an additional

A claim for unjust enrichment essentially states a claim for breach of an implied-In-law contract. Nematollahi v. United States, 38 Fed. Cl. 224, 235 (Fed. Cl. 1997), citing Trauma Serv. Group, Ltd. v. United States, 33 Fed. CI. 426, 432 (Fed. Cl. 1995), aff'd, 104 F.3d 1321 (Fed. Cir. 1997). However, jurisdiction under the Tucker Act extends only to contracts either express or implied in fact, and not to claims on contracts implied in law. Hercules, Inc. v. United States, 516 U.S. 417, 423, 116 S. Ct, 981, 995, 134 L. Ed. 2d 47 (1996), citing Sutton v. United States, 256 U.S. 575, 581, 41 S. Ct. 563, 565-66, 65 L. Ed. 1099 (1921).

Therefore, the Court lacks subject matter jurisdiction over the Plaintiffs' claim of unjust enrichment, and Count Four must be dismissed. The Plaintiffs conceded that they are not pursing their claim of unjust enrichment. (Pl. Mem. in Opp., p. 45, n.19.)

F. Count Six: Declaration of Utility's Interest

In Count Six, the Plaintiffs seek a declaration that NSP has no title to the funds it has collected from the Plaintiffs and an injunction against further collections.

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and distinct basis for the Court's conclusion that it lacks subject matter jurisdiction over the present matter.

(Complaint at ¶ 75.) The Tucker Act, however, does not confer equity jurisdiction. United States v. Woodall, 12 F.3d 791, 793 (8th Cir. 1993), citing United States v. Testan, 424 U.S. 392, 397-98, 96 S. Ct. 948, 952-53, 47 L. Ed. 2d 114 (1976). The Plaintiffs concede that the Tucker Act does not waive sovereign immunity for their claims for equitable relief (Pl. Mem. in Opp., pp. 67-68.) Instead, the Plaintiffs seek to proceed under the Declaratory Judgment Act, 28 U.S.C.A. § 2201-2202, and the All Writs Act, 28 U.S.C.A. § 1651, and seek to amend their Complaint to proceed under the APA, 5 U.S.C.A. § 702.

First, to the extent that the Plaintiffs seek a declaration that NSP has no title to the funds it collects from the Plaintiffs, the Court has already found that the Plaintiffs' allegation is erroneous as a matter of law. As previously addressed, revenue paid by the customers for service belongs to the company, and by merely paying their utility bills, customers do not acquire any interest in the funds of the company. Board of Public Utility, 271 U.S. at 32, 46 S. Ct. at 366. When the Plaintiffs in the present matter pay their fees for utility service, including a fee for the storage and disposal of spent nuclear fuel, that fee then becomes the property of

NSP, and the Plaintiffs no longer retain an interest in the fee after it is paid to NSP. To the extent that the Plaintiffs seek a declaration regarding title to funds in the NWF, on the other hand, the Plaintiffs have no standing to seek such a declaration and the Court has no jurisdiction over the subject matter, as previously discussed.

Secondly, to the extent that the Plaintiffs seek an "injunction against further collections," the Plaintiffs' claim must also be dismissed as a matter of law. There are two collections at issue in the present matter. First, NSP collects the fee from the Plaintiffs; second, DOE collects the fee from NSP.

To the extent that the Plaintiffs seek an injunction against the future collection of the fee in question by NSP, that claim may not proceed. As a preliminary matter, the Plaintiffs concede that they do not allege any wrongdoing by NSP and do not seek any recovery against NSP, but have merely named NSP as a Nominal Defendant. Nevertheless, to the extent that the Plaintiffs seek an injunction against NSP, the bar to that claim is discussed in further detail below.

In addition, the Plaintiffs cannot maintain an action for an injunction against the future assessment of fees by DOE, again, for reasons previously addressed in this Order. The Declaratory Judgment Act may allow individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 71, n.15, 98 S. Ct. 2620, 2629, n.15, 57 L. Ed. 2d 595 (1978). However, as previously addressed, the Plaintiffs cannot maintain this claim against DOE in the present matter. First, the Plaintiffs lack standing because, as previously discussed, DOE does not assess the fee in question against the Plaintiffs. DOE collects the fee in question from NSP only, pursuant to the NSP Standard Contract and the NWPA. Furthermore, as previously addressed in detail, the assessment of the fee in question does not constitute a taking under the Fifth Amendment.

Finally, the federal courts' power to exercise jurisdiction over declaratory judgment actions is discretionary. Aetna Cas. and Sur. v. Jefferson Trust and Sav., 993 F.2d 1363, 1366 (8th Cir. 1993), citing State Farm

Mut. Auto. Ins. Co. v. Bonwell, 248 F.2d 862, 865 (8th Cir. 1957). The Declaratory Judgment Act was an authorization, not a command; it gave the federal courts competence to make a declaration of rights, but it did not impose a duty to do so. Public Affairs Assoc., Inc. v. Rickover, 369 U.S. 111, 112, 82 S. Ct. 580, 582 7 L. Ed. 2d 604 (1962).

A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. Rickover, 369 U.S. at 112, 82 S. Ct. at 582. For the reasons stated above regarding the Court's jurisdiction, sovereign immunity, and the Plaintiffs' failure to otherwise state a claim, to the extent that the Court's power to exercise jurisdiction under the Declaratory Judgment Act is discretionary, the Court would otherwise decline to exercise jurisdiction in the present matter.

G. Filed Rate Doctrine and Primary Jurisdiction

In the alternative, to the extent that the Plaintiffs seek a refund or an injunction against the further collection of the fee in question by NSP, the Plaintiffs claims are barred by the filed rate doctrine and the doctrine of primary jurisdiction. NSF is a "public utility," as defined in Minn. Stat. § 216B.02, subd. 4. Accordingly, NSP may only charge rates that have been approved by the MPUC, pursuant to Minn. Stat. §§ 216B.03 and 216B.16. A "rate" is defined as "every compensation, charge, fare, toll, tariff, rental and classification, or any of them, demanded, observed, charged, or collected by any public utility for any service and any rules, practices, or contracts affecting any such compensation, charge, fare, toll, rental, tariff, or classification." Minn. Stat. § 216B.02, subd. 5.

The filed rate doctrine "has its genesis in Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251-252, 71 S. Ct. 692, 695, 95 L. Ed. 912 (1951)." Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962, 106 S. Ct. 2349, 2354-55, 90 L. Ed. 2d 943 (1986). In Montana-Dakota, the Supreme Court held that the plaintiff, who had argued that the utility's rates were fraudulent and unlawful, "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, . . ." Montana-Dakota, 341 U.S. at 251, 71 S. Ct. at 695. Ultimately, the Supreme Court held as follows:

> We hold that the right to a reasonable rate is the Right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

Montana-Dakota , 341 U.S. at 251-52, 71 S. Ct. at 695.

The Eighth Circuit applied the filed rate doctrine in 1992, in H.J. Inc. v. Northwestern Bell Telephone Co., 954 F.2d 485 (8th Cir. 1992). In an action brought by customers against a telephone company, the Eighth Circuit affirmed the district court's dismissal, holding that the claims "necessarily and plainly challenge the rates previously approved by the Commission, and were thereby barred by the filed rate doctrine. H.J. Inc., 954 F.2d at 493.

The Plaintiffs claims are similarly barred in the present action. To the extent that the Plaintiffs seek a refund of any fee paid to NSP, and/or to the extent that the Plaintiffs seek an injunction against the further collection of any fee by NSP, the Plaintiffs claims arc barred by the filed rate doctrine.

In the alternative, the primary jurisdiction doctrine will bar the Plaintiffs' claims. The primary jurisdiction doctrine is utilized to coordinate judicial and administrative decision making. Access Telecommunications v. Southwestern Bell Telephone Co., 137 F.3d 605, 608 (8th Cir. 1998). The doctrine comes into play whenever enforcement of the claim at issue requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. Atlantis Express, Inc. v. Standard Transportation Services, Inc., 955 F.2d 529, 532 (8th Cir. 1992), citing United States v. Western Pac. R.R., 352 U.S. 59, 63-64, 77 S. Ct. 161, 164-65, 1 L. Ed. 2d 126 (1956). There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction. Access Telecommunications, 137 F.3d at 608. Rather, in each case the question is whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created. Access Telecommunications, 137 F.3d at 608. These reasons include promotion of uniformity in statutory and regulatory construction and utilization of the agency's specialized knowledge. Atlantis Express, 955 F.2d at 532. Additionally, application of the doctrine is appropriate when policy considerations are at issue. Atlantis Express, 955 F.2d at 532-33.

The purposes behind the doctrine of primary jurisdiction are evident in the present matter. The matter implicates the utilization of a statutory and regulatory scheme so as to fund the permanent disposal of spent nuclear fuel. Deference to the MPUC in such a matter is appropriate.

Notwithstanding the primary jurisdiction doctrine, however, for all the reasons stated, the present matter may not proceed before this Court.

Conclusion

This lawsuit and related litigation around the nation have arisen pursuant to an unfortunate reality. Spent nuclear fuel exists and, notwithstanding DOE's obligations under the NWPA, no permanent repository has been built. However, the present lawsuit is not the appropriate remedy for the ill. The present lawsuit ignores the fact that spent nuclear fuel has already been generated by NSP, and the funds that have been collected in the NWF arc required to provide for permanent disposal.

NSP is currently responsible for the interim storage of the spent nuclear fuel; DOE remains responsible for its ultimate disposal. The Plaintiffs, however, have no such responsibility. If the putative class prevailed, the Plaintiffs would disgorge the NWF, but NSP and DOE would still be responsible for the spent nuclear fuel with no funds to provide for its disposal. A refund would therefore give rise to the need for future rate increases to finance the permanent disposal of the nuclear waste already produced, thus passing the cost on to future ratepayers.

Finally, the NSP Standard Contract pertains to the rights and obligations between NSP and DOE only. NSP pays its statutory fees into the NWF as a matter of law. The fact that NSP may fund this payment through a charge to the Plaintiffs' electricity bills neither affords this Court with jurisdiction over the present matter, nor entities the Plaintiffs to the forms of relief they seek.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Federal Defendants' Motion to Dismiss (Doc. No. 43) is **GRANTED.**

2. NSP's Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. No. 42) is **GRANTED.**

3. The Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE.**

4. The Federal Defendants' Motion to Dismiss NSP's Crossclaim (Doc. No. 56) is **GRANTED.**

5. NSP's Crossclaim is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 23, 1999

DONOVAN W. FRANK
Judge of United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Patrick Roedler; Thomas McDonough; Jeannie Strobel; Richard Palmer; Noreen Hoft; and HJ Company,

Plaintiffs,

v.

CLASS ACTION COMPLAINT

United States Department of Energy; the Secretary of the Treasury of the United States; and the United States of America,

Defendants,

and

Northern States Power Company,

Nominal Defendant.

JURISDICTION

1. Jurisdiction of this Court is invoked under 28 U.S.C. § 1331 (federal question), 28 U. S. C. § 1346(a)(2) (Tucker Act), 28 U. S. C. §§ 2201-2202 (Declaratory Judgment Act), 28 U.S. C. § 1651 (All Writs Act), and Amendment V, U.S. Constitution.

VENUE

2. Venue is proper in this district under 28 U.S.C. § 1391(e), as the plaintiffs and Northern States Power Company ("Utility") are located in this District and the fees in question are collected and paid in this district.

THE PARTIES

3. The plaintiffs are purchasers of electrical energy from Utility and in addition to the charge for energy paid to Utility, plaintiffs and putative class members also pay a fee to the United States Department of Energy ("DOE") for the disposal of spent nuclear fuel ("SNF"), based upon the usage of electricity by plaintiffs and members of the class generated at Utility's two nuclear power plants in Minnesota (known as Monticello and Prairie Island). The fee is mandated by the Nuclear Waste Policy Act, 42 U.S.C. § 10101, et seq. ("NWPA"), at a rate of 1 mil/kWh purchased (one mill per kilowatt hour).

4. Plaintiff Patrick Roedler is a citizen of the state of Minnesota whose address is 635 Summit Avenue, St. Paul, MN 55105. Mr. Roedler has purchased electric energy from Utility and has paid the nuclear waste fee in question for the electric energy he has purchased.

5. Plaintiff Thomas McDonough is a citizen of the state of Minnesota whose address is 1889 Clarence Street, Maplewood, MN 55109. Mr. McDonough has purchased electric energy from Utility and has paid the nuclear waste fee in question for the electric energy he has purchased.

6. Plaintiff Jeannie Strobel is a citizen of the state of Minnesota whose address is 1964 Elm Street, White Bear Lake, MN 55110. Ms. Strobel has purchased electric energy from Utility and has paid the nuclear waste fee in question for the electric energy she has purchased.

7. Plaintiff Richard Palmer is a citizen of the state of Minnesota whose address is 1634 East Ivy Avenue, St. Paul, MN 55106. Mr. Palmer has purchased electric energy from Utility and has paid the nuclear waste fee in question for the electric energy he has purchased.

8. Plaintiff Noreen Hoft is a citizen of the state of Minnesota whose address is 832 Wood Hill Drive, Chanhassen, MN 55317. Ms. Hoft has purchased electric energy from Utility and has paid the nuclear waste fee in question for the electric energy she has purchased.

9. Plaintiff HJ Company is a Minnesota corporation with a principal place of business at 10800 Normandale Avenue South, Bloomington, MN. HJ Company has purchased electric energy from Utility and has paid the nuclear waste fee in question for the electric energy it has purchased.

10. The defendant United States Department of Energy is an agency of the government of the defendant United States of America.

11. The defendant Secretary of the Treasury of the United States is a party by virtue of 42 U.S.C. § 10222 as custodian of the Nuclear Waste Fund ("NWF").

12. Utility, named as a nominal defendant, is an entity covered by 42 U.S.C. § 10101 and has entered into a Standard Contract for Disposal of Spent Radioactive Waste ("Standard Contract") with the DOE which obligates the DOE to accept and dispose of the SNF generated at Utility's two nuclear power plants in return for the fees paid by the plaintiffs and putative class members who are the purchasers of the atomic energy generated at the two plants.

13. Utility's principal place of business is 414 Nicollet Mall, Minneapolis, MN 55401. Utility is the

owner/operator of two nuclear facilities in the State of Minnesota licensed by the DOE, each of which produces SNF.

CLASS ALLEGATIONS

14. Plaintiffs bring this action on behalf of themselves and under Rule 23(b) of the Federal Rules of Civil Procedure on behalf of all members of the following proposed class:

> Plaintiffs and members of the class are all those persons, firms, corporations or other entities that have purchased electricity from Utility and have paid to DOE, through the agency of Utility, the fees mandated by the NWPA, 42 U.S.C. § 10101, et seq., in an amount less than $10,000 per reporting period, which fees have been and are being paid into the NWF created pursuant to 42 U.S.C. § 10222.

15. The class is so numerous that joinder of all members is impracticable. Plaintiffs believe that there are thousands of class members as above described, the exact number and their identities are known and identifiable by Utility.

16. There are questions of law and fact common to the class, which include the following:

a) The wrongful extracting of the fees paid under the Standard Contract, and the type and common pattern of injury sustained as a result of the breach thereof;

b) The breach by the DOE of the Standard Contract and the wrongful retention of the fee extracted under the Standard Contract from plaintiffs and putative members of the class; and,

c) Defendant DOE's refusal to act, on grounds generally applicable to the class, thereby requiring final affirmative relief with respect to the class as a whole.

17. Plaintiffs are members off the class and plaintiffs' claims are typical of the claims of the class members, and plaintiffs will fairly and adequately protect the interests of the class. The interests of plaintiffs are coincident with, and not antagonistic to, those of the other members of the class.

18. The prosecution of separate actions by individual members of the class would create a risk of

inconsistent or varying adjudications, establishing incompatible standards of conduct for defendants.

19. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

20. A class action is superior to other available methods for fair and efficient adjudication of this controversy. The class is readily definable and is one for which adequate records exist of the payment of the fees into the NWF.

21. Prosecution as a class action will eliminate the possibility of repetitious litigation and plaintiffs have engaged experienced and competent counsel to prosecute this action.

FACTUAL AND LEGAL BACKGROUND

22. Congress in 1982 enacted the Nuclear Waste Policy Act, 42 U.S.C. § 10101, et seq. In the NWPA, Congress created a comprehensive scheme for the storage and disposal of high-level radioactive waste generated by civilian nuclear power plants. The NWPA authorized the Secretary of Energy ("Secretary") to enter into contracts with

owners and generators of high-level radioactive waste and spent nuclear fuel under which the private parties were to pay the Secretary statutorily imposed fees in return for which the Secretary, "beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved . . . ." 42 U.S.C. § 10222(a)(5)(B).

23. The NWPA establishes that, in return for a payment of fees by the utilities, the DOE will construct repositories for SNF, with the utilities generating the waste bearing the primary responsibility for on-site storage of SNF at their nuclear power plants until DOE accepts the SNF "in accordance with the provisions of [the NWPA]." 42 U.S.C. § 10131(a)(5).

24. The NWPA requires the utilities to enter into a Standard Contract with the DOE for disposal of SNF. Pursuant to 42 U.S.C. § 10222(a)(5), the contracts provide that:

> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel as expeditiously as practicable upon the

request of the generator or owner of such waste or spent fuel, and,

(B) in return for the payment of fees established by this section, the Secretary beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel as provided in [the NWPA].

25. The final Standard Contract adopted by the DOE states that, "[t]he services to be provided by the DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF ... from the civilian nuclear power reactors specified ... has been disposed of." 10 C.F.R. § 961.11, Art. II.

26. The Nuclear Waste Fund was created by 42 U.S.C. § 10222. The NWF was supposed to have paid for the disposal of SNF. The Secretary of the Treasury is the custodian of the NWF. The sole source of monies in the NWF is the fees paid by customers of nuclear utilities including the plaintiffs and the putative class members. On information and belief the amount paid by the Utility's ratepayers into the NWF through December 31, 1997, is

approximately $250 million. The Utility simply passes through the fees it collects from its ratepayers into the NWF.

THE PRIOR LITIGATION

Indiana Michigan Power Co.
v. United States Dept. of Energy,
88 F.3d 1272 (D.C. Cir. 1996)

27. By 1993 many states and utilities became concerned about the DOE's ability to meet its obligations under the NWPA. Therefore, they requested the DOE to address its responsibilities under the NWPA, particularly the January 31, 1998, deadline to begin accepting SNF for disposal. In February 1994 the Secretary indicated that, while at the time the NWPA was enacted the DOE "envisioned that it would have a waste management facility in operation and prepared to begin acceptance of [SNF] in 1998," the DOE subsequently concluded it did not have "a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility constructed under the [NWPA]."

28. To address this issue, on May 25, 1994, the DOE published a Notice of Inquiry on Waste Acceptance Issues, requesting the views of affected parties on matters

relating to the continued storage of SNF at reactor sites beyond 1998. The DOE presented its preliminary finding that it had "no statutory obligation to accept [SNF] beginning in 1998 in the absence of an operational repository or other facility constructed under the [NWPA]." The DOE did note, however, that the terms of the Standard Contract may have created such an expectation. 59 Fed. Reg. 27,008 (1994).

29. On April 28, 1995, the DOE issued its Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793 (1995) ("Final Interpretation"). In the Final Interpretation, DOE stated that it would not be able to begin taking SNF by January 31, 1998, the date established by the NWPA. The DOE concluded that it did not have an unconditional statutory or contractual obligation to accept high-level waste and spent nuclear fuel beginning January 31, 1998, in the absence of 2 repository or other storage facility constructed in compliance with the NWPA. The agency also determined that it had no authority under the NWPA to provide storage in the absence of a facility that had been authorized, constructed and licensed in accordance with the NWPA. Finally, the DOE declared that, even if it did have an unconditional obligation under the statute, the

Delays Clause of the Standard Contract would provide an administrative remedy for the DOE's failure to satisfy its obligations under the statute. Id.

30. On June 20, 1994, in anticipation of the DOE's Final Interpretation, 37 state agencies and Offices of the Attorneys General from 27 states filed suit in the United States Court of Appeals for the D.C. Circuit seeking enforcement of the DOE's obligations under the NWPA. On July 28, 1995, this lawsuit, 2 lawsuit by 24 other state agencies, and a third lawsuit filed by 25 nuclear utility intervenors were consolidated. The petitioners challenged the DOE's refusal to comply with the statutory deadline of January 31, 1998, for its disposal obligations under the NWPA.

31. First, the petitioners argued that the DOE's refusal to accept as legally binding the agency's commitment to begin accepting SNF by January 31, 1998 either for above-ground storage or for disposal in a deep geologic repository -- was a breach of the agency's contracts with nuclear utilities and an attempt to nullify the NWPA's requirement that the DOE begin taking possession of the waste then. In the absence of any disposal alternative

provided by the DOE, the petitioners argued that nuclear utilities should not be required both to provide on-site storage at nuclear power plants and pay (their ratepayers' money] into the NWF indefinitely.

32. Second, the petitioners argued that the DOE's current interpretation was a reversal of the agency's position at the time of the NWPA's passage. In a 1984 letter to Senator Bennett Johnston, then-Secretary of Energy Donald Hodel stated that the NWPA and contracts signed between utilities and the DOE together, "create an obligation for (DOE] to accept the spent fuel in 1998, whether or not a repository is in operation."

33. Third, the petitioners argued that the DOE's acceptance of 20 metric tons of foreign SNF contradicted its position that the agency lacks the facilities necessary to accept SNF from domestic generators.

34. The court disagreed with the DOE's interpretation of its obligations under the NWPA. The court found that the "DOE's duty under [42 U. S.C. § 10222(a)(5)] to dispose of the SNF is conditioned on the payment of fees by the [nuclear plant] owner and is triggered, at the latest, by the arrival of January 31, 1998," and that nowhere did the

statute indicate that this obligation was tied to the commencement of repository operations. Indiana Michigan, 88 F.3d at 1276.

35. The court found that it was premature to determine the appropriate remedy inasmuch as the DOE had not yet defaulted upon either its statutory or contractual obligations. In conclusion, the court held that Section 302(a)(5)(B) of the NWPA, 42 U.S.C. § 10222(a)(5)(B), creates an obligation in the DOE, reciprocal to the utilities' obligation to pay their ratepayers' money into the NWF, to start disposing of the SNF no later than January 31, 1998.

Northern States Power Co.
v. United States Dept. of Energy,
128 F.3d 764 (D.C.Cir. 199T)

36. Following the D.C. Circuit's decision in Indiana Michigan numerous utilities and state commissions which paid their ratepayers' fees into the NWF petitioned the D.C. Circuit for a writ of mandamus requiring the DOE to comply with Indiana Michigan and begin disposing of SNF by the statutory deadline of January 31, 1998.

37. In considering the petitioners' request for a writ of mandamus, the court concluded that petitioners met

two of the three criteria for granting such a writ, specifically that petitioners have a clear right to relief and that the DOE has a clear duty to act.

38. While the court found that the petitioners have a clear right to relief and the DOE has a clear duty to act, it declined to issue the broad writ of mandamus sought by petitioners because of the court's conclusion that petitioners had another potentially adequate remedy under the contract. The court concluded that DOE's delay was avoidable and therefore it could be liable for the additional costs imposed on the utilities for the failure of the DOE timely to accept SNF. The court found that the DOE could not excuse its failure to perform as "unavoidable" and therefore avoid liability for damages caused to the utilities. The court further concluded that the DOE could not implement any interpretation of the Standard Contract that excuses its failure to perform on the grounds of "acts of Government in either its sovereign or contractual capacity."

39. Under these two decisions of the D.C. Circuit, both issued prior to January 31, 1998, if the DOE failed to begin accepting SNF by January 31,1998: (1) it would have breached the Standard Contract; (2) it had no defenses which

it can assert for such breach; and (3) it is liable for damages caused by such breach.

40. DOE failed to begin accepting SNF by January 31, 1998.

PLAINTIFF RATEPAYERS' CONTRIBUTION TO THE NWF THROUGH UTILITY TO DATE

41. The Standard Contract sets the terms for payment into the NWF. Its terms are specified by federal regulation. 10 C.F.R. § 961.11.

42. The NWPA specified that any utility not signing a disposal contract with the DOE would not be permitted to obtain or renew a license to operate its nuclear power plants. Utilities had no practical alternative to entering into the Standard Contract and were limited by provisions of the NWPA in their ability to negotiate the terms of these contracts.

43. As specified in the NWPA, the Standard Contract required nuclear utilities' ratepayers to pay a fee sufficient to cover the total life-cycle costs of the repository program. These fees were set by the NWPA at 1 mil (one-tenth of a cent or $.001) per kilowatt-hour (1 mil/kWh)

of electricity generated and sold to customers from each nuclear power plant.

44. As interpreted by the federal courts, the Standard Contract required the DOE to perform by taking SNF not later than January 31, 1998.

45. The DOE and Utility entered into a Standard Contract on June 20, 1983, whereby the DOE agreed to begin taking Utility's SNF not later than January 31, 1998, and to continue to do so until Utility's SNF had been completely disposed of. Utility continues to pay fees collected from its ratepayers to the NWF at the rate of some $12 million per year and the source of fees are the plaintiffs and putative class members. Those fees are passed directly through from the ratepayer members of the class to the NWF by Utility.

46. Utility does not have and, on information and belief, does not claim any interest in the fees it collects from its ratepayers under the Standard Contract and passes through to the NWF.

47. In conformance with its Standard Contract, Utility pays the mil/kWh to the DOE for electricity generated and sold from the Prairie Island and Monticello nuclear

plants. The fees are directly paid by ratepayers through a line item on their monthly electricity bills, the euphemistic "Resource Adjustment." Through 1997, Utility ratepayers had made payments of approximately $160 million on electricity generated and sold since May 1983. In addition to ongoing payments, Utility's Standard Contract required a retroactive payment for spent-fuel. accumulated from the initial startup of Utility's nuclear plants through the initiation of the 1 mil/kWh fee. The Standard Contract offered utilities a choice of paying a lump-sum fee or of spreading the payments over ten years with additional interest payments determined by DOE. Utility paid this fee in a lump-sum of approximately $94.1 million from a sinking fund financed by ratepayers. In total, Utility's ratepayers have made payments to the NWF of approximately $254.9 million (i.e., $160 million + $94.1 million) through 1997. All of these funds paid to DOE were paid by the ratepayer plaintiffs and members of the putative class.

48. In addition to payments by Utility's ratepayers (and ratepayers of other nuclear utilities) to the NWF, the DOE has earned substantial interest on the funds in the NWF from their placement in interest-bearing

accounts by the United States Treasury. Utility's ratepayers' payments alone have earned over $90 million in interest through 1997. Total payments of approximately $15 billion from all nuclear utilities earn interest at a rate of approximately $1 billion per year.

DAMAGES CAUSED TO RATEPAYERS BY THE DOE'S BREACH

49. The payments to the NWF have been financed solely by ratepayers of nuclear utilities through the Resource Adjustment (1 mil/kWh), a direct pass-through from the ratepayers to the DOE which appears on monthly billing statements. To date, Utility's ratepayers have contributed $254.9 million to the NWF. A repository to accept SNF will not begin operation until after 2010, if ever.

50. In spite of collecting hundreds of millions of dollars from the plaintiffs and putative class members through the agency of Utility, the DOE has failed to meet its obligations under the NWPA, is in breach of its Standard Contract, and at least 15 years behind its proposed schedule for developing an SNF repository.

51. The DOE's breach of the Standard Contract due to its failure to begin accepting SNF by January 31,

1998, has caused and continues to cause substantial damages to the plaintiffs and putative class members, in part due to the substantial and on-going costs of on-site storage of the SNF generated at Utility's Monticello and Prairie Island nuclear generating plants.

THE IMPACT ON UTILITY'S PRAIRIE ISLAND AND MONTICELLO NUCLEAR GENERATING PLANTS

52. Utility has two nuclear-powered generating plants: Prairie Island and Monticello. Ratepayers have sustained additional costs for the DOE's failure to accept SNF from these generating plants by the January 31, 1998, deadline, and will incur further additional costs if the DOE does not assume its disposal obligations prior to the exhaustion of on-site storage capacities at these facilities. If the DOE fails to begin disposing of SNF at Monticello in 2008, Utility estimates that the facility faces a possible shut-down two years prior to the expiration of its operating license in 2010.

53. Prairie Island consists of two nuclear reactors: Unit 1 and Unit 2. Each unit has an accredited generation capacity of approximately 530 MW. In total, the Prairie Island station accounts for approximately 23 percent of the

energy and 14 percent of the capacity on Utility's system. If on-site disposal of Prairie Island's SNF does not begin before 2004, the facility's on-site storage capacity will be exhausted. As a consequence, ratepayers will incur substantial payments associated with the premature shutdown of the Prairie Island plant. Specifically, ratepayers would be forced to pay $687 million to $1.0535 billion (in 1995 dollars) in additional costs through 2014.

RATEPAYERS CONTINUE TO PAY INTO THE NWF

54. Despite the DOE's breach of the Standard Contracts as found by the court in Indiana Michigan and NSP v. DOE, and the court's conclusion that utilities no longer have a reciprocal obligation to pay into the NWF, and the DOE is liable for damages resulting from its breach, Utility's ratepayers continue to be billed by Utility for the fee (I mil/kWh), which fees are still being paid over to the DOE. Moreover, all additional costs which are incurred for the DOE's breach and failure to accept SNF are being borne, and will continue to be borne, by Utility's ratepayers as Utility continues to pass such costs along to the ratepayers.

55. The DOE's violation of its statutory and contractual obligations has led to an accumulation of billions of dollars in the NWF, under a program of collection of fees that has not inured to the benefit of ratepayers under the Standard Contract.

56. Utility's ratepayers have not received used and useful utility services for their fee payments into the NWF.

57. In spite of its failure to comply with its statutory and contractual obligations, the DOE continues to collect the aforesaid fees through the agency of Utility from the plaintiffs and the putative class members.

58. The DOE has collected some $15 billion for the NWF. Upon information and belief, some $7 billion of the funds have been and are being spent on matters not related to the clear mandate of the NWPA and the Standard Contract, namely, the disposal of domestically generated civilian SNF.

59. On information and belief, the DOE has, inter alia, expended NWF fees paid by the plaintiffs and putative class members for storage of SNF from 41 foreign countries.

60. The DOE also proposes to use funds from the NWF to pay damages to nuclear utilities paused by the DOE's failure to meet its contractual obligations, despite the fact that the NWF is the ratepayers' money, not that of the corporate utilities or their shareholders.

61. The unlawful actions of the DOE have worked and will work great prejudice and monetary damage to the fee paying plaintiffs and putative class members.

62. Despite the $15 billion collected by the DOE as fees, no SNF covered by the NWPA and the Standard Contract has been taken for storage or disposal by the DOE.

63. The plaintiffs and putative class members, who are the real parties injured by the DOE's violations of the NWPA and breach of its Standard Contract with Utility, are third party beneficiaries under the Standard Contract because the fees are directly imposed on the ratepayers through the agency of Utility, and such costs are not borne by Utility or its shareholders. Further, plaintiffs and members of the putative class are exposed to duplicative costs that would otherwise be avoided had the DOE complied with its statutory and contractual obligation to accept SNF beginning January 31, 1998.

COUNT I

BREACH OF CONTRACT

64. Plaintiffs reallege paragraphs 1 through 63 above as though fully set forth herein.

65. Plaintiffs and the putative class members are third party beneficiaries under the Standard Contract. All fees paid into the NWF are fees collected directly from ratepayers (1 mil/kWh) and are not paid by Utility or its shareholders. All damages caused by the DOE's breach of the Standard Contract are damages borne by the plaintiffs and the putative class Members who should be fully compensated for the DOE's breach, in an amount to be determined at trial.

COUNT II

BREACH OF IMPLIED CONTRACT

66. Plaintiffs reallege paragraphs 1 through 65 above as though fully set forth herein.

67. Plaintiffs and the putative class members are parties to an implied contract with the DOE. All fees paid into the NWF are fees collected directly from ratepayers (1 mil/kWh) and are not paid by Utility or its shareholders. All damages caused by the DOE's breach of the Standard

Contract are damages borne by the plaintiffs and the putative class members who should be fully compensated for the DOE's breach, in an amount to be determined at trial.

COUNT III

TUCKER ACT (TAKING)

68. Plaintiffs reallege paragraphs 1 through 67 above as though fully set forth herein.

69. The DOE has accepted and continues to accept payments by Utility's ratepayers into the NWF, notwithstanding the DOE's breach of the Standard Contracts as adjudicated in Indiana Michigan and NSP v. DOE. Plaintiffs and the putative class members have received and continue to receive nothing for their fees to the NWF. The DOE's actions constitute a taking without just compensation, and therefore compensation is available under the Tucker Act, 28 U.S.C. § 1346(a)(2), in an amount to be determined at trial.

COUNT IV

UNJUST ENRICHMENT

70. Plaintiffs reallege paragraphs I through 69 above as though fully set forth herein.

71. The contributions of nuclear utility ratepayers including plaintiffs and putative class members into the NWF have been deposited into an interest-bearing account by the Secretary of the Treasury. The contributions of Utility's ratepayers have earned approximately $90 million in interest through 1997. The DOE, due to its breach of the Standard Contact, and its failure to undertake its reciprocal obligation to accept SNF for disposal, has been unjustly enriched by the interest earned on Utility's ratepayers' contributions. As such, this interest should be refunded to plaintiffs and the putative class members or credited against future fee payments into the NWF.

COUNT V

FIFTH AMENDMENT

72. Plaintiffs reallege paragraphs 1 through 71 above as though fully set forth herein.

73. The DOE has accepted and continued to accept payments by Utility's ratepayers into the NWF, notwithstanding the DOE's breach of the Standard Contracts. Ratepayers have received and continue to receive nothing for their fees to the NWF. The DOE's actions constitute a taking of plaintiffs' and putative class members' property without

due process of law, for which compensation is due, and injunctive relief is mandated.

COUNT VI

DECLARATION OF UTILITY'S INTEREST

74. Plaintiffs reallege paragraph's 1 through 73 above as though fully set forth herein.

75. Plaintiffs are entitled to a declaration that Utility has no right, title or interest in the monies it has collected from plaintiffs and putative class members for payment into the NWF, and an injunction against further collections.

RELIEF SOUGHT

WHEREFORE, plaintiffs and members of the putative class request:

1. Refund or credit of the sums collected from them as fees through the agency of Utility and paid into the NWF;

2. Refund or credit of the $90 million of interest earned on their contributions to the NWF;

3. Damages for all amounts paid by them as ratepayers for on-site storage costs caused by the DOE's breach of the Standard Contract with Utility;

4. An accounting of monies expended from the fees collected and deposited in the statutorily dedicated NWF;

5. An injunction against the collection of further fees pending the DOE's substantial compliance with the NWPA;

6. In the alternative, establishment of an externally managed escrow account into which all fee payments of the ratepayers are to be made, and the establishment of criteria for the release of funds placed in escrow;

7. A declaration that Utility has no right, title, or interest in the monies it has collected from ratepayers for payment into the NWF;

8. Such other and further relief as is just and equitable;

9. That the plaintiffs and putative class members have their costs, interest and reasonable attorneys fees as allowed by statute or applicable law.

Dated: August 7, 1998

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§ 10222. Nuclear Waste Fund

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of

heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section. In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection, of the fee will provide

sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose ail adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that -

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless -

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of Title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than -

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of Title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) **Establishment of Nuclear Waste Fund**

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of -

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e) of this section, which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (e) of this section, only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including -

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such repository, monitored, retrievable storage facility or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

(e) Administration of Waste Fund

(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition

and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of Title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States -

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of Title 31.

(3) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

(Pub.L. 97-425, Title III, § 302, Jan. 7, 1983, 96 Stat. 2257.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1983 Acts. House Report No. 97-491, see 1982 U.S. Code Cong. and Adm. News, p. 3792.

References in Text

Subsection (c) of this section, referred to in subsec. (a)(3), was in the original "subsection (c) 126(b)" and was translated as subsection (c) of this section as the probable intent of Congress in view of the establishment of the Nuclear Waste Fund by subsec. (c) of this section and the absence of a section 126 in Pub.L. 97-425.

This subchapter, referred to in subsecs. (a)(5)(B), (d) and (e)(5), was in the original "this subtitle", and was translated as this subchapter to reflect the probable intent of Congress because Title III of Pub.L. 97-425, which enacted this sub-chapter, does not contain subtitles.

Such Act, referred to in subsec. (e)(5), probably means chapter 31 of Title 31, Money and Finance.

CROSS REFERENCES

Indemnification of nuclear waste activities funded by Nuclear Waste Fund, see 42 USCA § 2210.

Nuclear Waste Fund as meaning fund established under this section for purposes of National Regulatory Commission user fees and annual charges, see 42 USCA § 2214.

LIBRARY REFERENCES

Administrative Law

Standard contract, disposal of spent nuclear fuel and waste, see 10 C.F.R. § 961.1 et seq.

American Digest System

Environmental protection and health regulations generally, disposition of nuclear waste, see Health and Environment 🔑 25.5(5.5, 7).

Fiscal management; collection, custody, and disbursement of federal funds in general, see United States 🔑 81, 82(l) et seq.

Power of government to enter into contracts generally, see United States 🔑 59 et seq.

Encyclopedias

Environmental protection and health regulations generally; disposition of nuclear waste, see C.J.S. Health and Environment §§ 61 et seq., 66.5.

Fiscal management; collection, custody, and disbursement of federal funds in general, see C.J.S. United States §§ 121, 122 et seq.

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for

electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section. In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose ail adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that -

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless -

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of Title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than -

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of Title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) Establishment of Nuclear Waste Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of-

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e) of this section, which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (e) of this section, only for purposes of radioactive waste disposal activities under subchapters I and 11 of this chapter, including-

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of

facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such repository, monitored, retrievable storage facility or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

(e) Administration of Waste Fund

(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary. annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of

Energy submitted at such time in accordance with chapter 11 of Title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States -

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United

States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of Title 3 1.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations

available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

(Pub.L. 97-425, Title III, § 302, Jan. 7, 1983, 96 Stat. 2257.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

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American Digest System

Environmental protection and health regulations generally, disposition of nuclear waste, see Health and Environment 🔑25.5(5.5, 7).

Fiscal management; collection, custody, and disbursement of federal funds in general, see United States 🔑81, 82(l) et seq.

Power of government to enter into contracts generally, see United States 🔑59 et seq.

Encyclopedias

Environmental protection and health regulations generally; disposition of nuclear waste, see C.J.S. Health and Environment §§ 61 et seq., 66.5.

Fiscal management; collection, custody, and disbursement of federal funds in general, see C.J.S. United States §§ 121, 122 et seq.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Patrick Roedler, Thomas McDonough;
Jeannie Strobel; Richard Palmer,
Noreen Hoft; and HJ Company,

Plaintiffs,

v.

United States Department of Energy; the
Secretary of the Treasury of the United States;
and the United States of America,

Defendants,

and

Northern States Power Company.

Civil No. 98-1843

AFFIDAVIT OF
MARK HERVEY

STATE OF MINNESOTA)
COUNTY OF HENNEPIN)

MARK HERVEY, under oath, states:

1. I am the General Manager of Revenue Requirements in the Regulatory Services Department of Northern States Power Company ("NSP"). I am knowledgeable about NSP's retail electric rates in Minnesota.

2. NSP owns and operates two nuclear power stations (namely, Prairie Island and Monticello), which have been generating electricity for NSP and its customers since the early 1970s.

3. Since the inception of State-wide utility regulation in Minnesota in 1976. NSP has accounted for costs associated with the disposal of nuclear fuel. NSP has booked that expense, as well as all other expenses recoverable in rates, through the Uniform System of Accounts set up by the Federal Energy Regulatory Commission ("FERC"). The FERC Uniform System of Accounts is an accepted accounting methodology used to track utility expenses that are recoverable in the utility's rate structure.

4. All money collected for payment of nuclear fuel disposal expenses has been recovered through the portion of NSP's rates called the "Fuel Clause Adjustment" ("FCA"). On NSP's retail bills the FCA is included in the "Resource Adjustment."

5. The electric FCA is a rate schedule provision that allows NSP to vary charges made to customers in response to changes in fuel costs and purchased power expenses. The FCA contains the energy costs associated with the costs of

fossil and nuclear fuel as recorded in FERC Accounts 151 and 518 and the cost of purchased power in Account 555. Since the expense of disposing of nuclear fuel is a "fuel" expense, it is booked in FERC Account No. 518. It is, consequently, included in the FCA.

6. The FCA is based on the difference between the actual amount of fuel costs and purchased power expenses, and the base level of fuel and purchased power expenses as determined in NSP's last rate case. The base level is set in rate cases using the best information available at that time. The FCA then acts as a "true up" of the base level between rate cases to match more closely the actual fuel expense incurred. Fuel and purchased power expense tends to be highly variable and unpredictable. Consequently, the FCA mechanism helps assure that ratepayers pay rates that more accurately reflect the utility's cost of providing service.

7. At least since the beginning of State-wide regulation in 1976, NSP's Minnesota retail rates have included the FCA provision. The Minnesota FCA tracks the same types of expenses as contained in the FERC Uniform System of Accounts. Exhibit I is the relevant tariff sheet from NSP's original rate case showing that the FCA was in place. That

sheet shows that costs recorded in FERC Account No. 518 are included in the FCA. At least since the beginning of state-wide regulation money collected for nuclear waste disposal expenses have been includable in the FCA. Since these expenses have been present for so long they are essentially embedded in base level of rates as set in NSP's rate cases. This is true since base rates are set to include known and stable costs (such as this fee) while the FCA tracking mechanism adjusts the fuel cost to account for the difference between the base level of fuel expense and actual fuel costs.

8. Originally, NSP accrued the projected fuel disposal liability using the straight line accounting method. Effective August 1, 1981 NSP changed its recovery method for nuclear fuel disposal costs from straight line to an internal sinking fund. Minnesota Public Utilities Commission Docket No. E-002/M-81-306 (Exhibit 2).

9. On June 20, 1983 NSP and the United States Department of Energy ("DOE") entered into three separate contracts for disposal of spent nuclear fuel and high-level radioactive waste. (Exhibits 3, 4 and 5) The three contracts for disposal are identical in all respects except that they deal

with nuclear waste from different units. Such contracts for disposal are commonly referred to as the "Standard Contract."

10. Article 8 of the Standard Contract provides that NSP pay to the Department of Energy a fee in the amount of 1.0 mill per kilowatt-hour of energy generated by the relevant nuclear reactor. This fee has been collectible under the Standard Contract since April 7, 1983. For all electricity generated by nuclear power stations prior to April 7, 1983 the Standard Contract requires that NSP pay a one-time lump sum fee equivalent to 1.0 mill per kilowatt-hour of energy generated.

11. In 1983 NSP proposed a change in its method of accounting for the nuclear waste disposal expense. Exhibits 6, 7 and 8 are NSP's applications to FERC requesting a change in the composition of the FCA to reflect NSP's implementation of this new mechanism for collecting funds for the disposal of nuclear fuel. Exhibit 6 states:

> The change in accounting method being sought would: (1) eliminate a portion of the Company's current sinking fund accrual which is used to recover the costs of transporting spent nuclear fuel to a permanent disposal site along with the costs of permanent disposal; and (2) substitute the 1.0 mil per

kWh assessment to recover these costs, as established by the Department of Energy (DOE) in accordance with the Nuclear Waste Policy Act of 1982.

12. Exhibit 9 is the FERC Order accepting NSP's proposed change. This resulted in a reduction of the accrual in FERC Account No. 518 from 1.75 mil to 1.00 mil per kWh. *See In re Northern States Power Company,* FERC Docket No. ER83-557-000, 24 FERC ¶ 61,292 (1983).

13. Exhibit 10 is a copy of the October 26, 1983 filing NSP made in the State of Minnesota reflecting this change in NSP's Minnesota rates. This is the operative document that set the expense to be collected which has continued in place to the present time. Exhibit 10 states:

> This fuel clause adjustment includes a refund credit of 0.075¢ per Kwh as a result of the September 16. 198") Order by the Federal Energy Regulatory Commission in Docket No. ER83-557-000. In accordance with the Nuclear Waste Disposal Act of 1982, the Department of Energy implemented a new procedure for charging utilities for the costs of permanent disposal of nuclear fuel after April 6, 1983. The new procedure provides a 1.0 mill per Kwh assessment in place of the current sinking fund accrual method used by Company. This change results in a reduction in the costs of nuclear fuel disposal which are booked in Account 518 and

recovered from NSP's customers through the monthly fuel clause adjustment. Nuclear fuel disposal costs recorded in September, 1983 reflect the 1.0 mill per Kwh assessment.

14. The money collected before April 7, 1983 that NSP held in its internal sinking fund was transferred to DOE pursuant to the Standard Contract. In June 1985, NSP made a payment to the DOE in the amount of $94,398,021. The prudence of NSP's payment of this amount was accepted by the Minnesota Public Utilities Commission in its Findings of Fact, Conclusions of Law, and Order in Docket No. E-002/GR-85-558. (Exhibit 11 is pages 1, 24 and 25 of that Order.)

15. NSP's current rates were set as a result of NSP's most recent rate case. MPUC Docket No. E-002/GR-92-1185. *See Order After Reh'g,* January 14, 1994. Exhibit 12 is the Fuel Clause Rider adopted by the MPUC in NSP's most recent rate case. NSP's most recent rate sheets continue to include the FCA. (Exhibit 13.) The FCA continues to include expenses booked under FERC Account No. 518. Nuclear fuel disposal expenses are included in FERC Account No. 518.

16. Since the 1983 filings, NSP has paid the DOE all fees required under the Standard Contract.

/s/
MARK HERVEY

SUBSCRIBED AND SWORN TO

before me this 10th day of November, 1998.

/s/
Notary Public
MARK L PELTO
Notary Public – Minnesota
Ramsey County
My Commission Expires 1/31/2000

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HEADLINE: TESTIMONY MARCH 17, 1994 JAMES J. HOWARD CHIEF EXECUTIVE OFFICER NORTHERN STATES POWER COMPANY HOUSE RESOURCES/ ENERGY AND MINERAL RESOURCES OVERSIGHT AND INVESTIGATIONS STORAGE OF SPENT NUCLEAR FUEL

BODY:

STATEMENT OF JAMES J. HOWARD

CHAIRMAN OF THE BOARD AND CHIEF EXECUTIVE OFFICER

NORTHERN STATES POWER COMPANY

Before The

OVERSIGHT AND INVESTIGATIONS

and

ENERGY AND MINERAL RESOURCES SUBCOMMITTEES

COMMITTEES ON NATURAL RESOURCES

U.S. HOUSE OF REPRESENTATIVES

March 17, 1994

Mr. Chairman and members of the Committee, I am Jim Howard, Chairman of the Board and Chief Executive Officer of Northern States Power Company (NSP). I very much appreciate the opportunity to appear before you today.

At the outset, I want to make clear what should be obvious: the government's civilian nuclear waste program is in serious trouble. A decade of mismanagement and government avoidance of difficult decisions has caused the civilian nuclear waste program to be off schedule and cost too much. Confidence in the government's ability to deal with civilian nuclear waste has been seriously undermined. Regardless of one's position on nuclear power, this is an intolerable situation. We in the nuclear power industry and the customers we serve, your constituents, cannot do much about these problems ourselves. We need your help.

This Committee had the courage and foresight to pass the Nuclear Waste Policy Act of 1982 and the Nuclear Waste Policy Act Amendments in 1987. Today, I ask each of you to exercise that same political courage and work to reform the civilian nuclear waste program. Specifically, I urge this Committee to:

- support a privately constructed and operated temporary storage facility for nuclear waste until the federal government can accept the waste;
- continue vigorous oversight of the Department of Energy's (DOE) waste program to ensure that tough but necessary decisions are made, and that actions are taken; and
- support adequate funding and expeditious completion of a permanent repository for the nation's commercial spent nuclear fuel.

Northern States Power Company is an investor owned electric and natural gas utility headquartered in Minneapolis, Minnesota. NSP generates, transmits and distributes electricity to 1.4 million customers in Minnesota, Wisconsin, North Dakota, South Dakota and Michigan's Upper Peninsula. NSP relies on nuclear power to meet over one-third of the power supply needs of our customers. NSP's nuclear plants consistently have been ranked among the most reliable, safest and lower cost nuclear plants in the country. Despite that record of safety, economy and reliability, our Prairie Island nuclear plant faces the prospect of having to shut down next year, some 20 years before the end of its operating license. Why? Because of the federal government's failure to fulfill its obligations to electric consumers as mandated by the Nuclear Waste Policy Act.

Resolution of the civilian high level nuclear waste disposal problem is an issue of great importance not just to NSP and the customers we serve, but to the entire nation. Without a renewed commitment to a resolution of the high level nuclear waste disposal problem, we as a nation face the prospect of prematurely shutting down nuclear power plants that today generate 22 percent of our electricity our nation cannot afford that.

Just last week, I returned from a meeting held on the Mescalero Apache Reservation in New Mexico to discuss the development of a private storage facility for spent nuclear fuel. The Mescalero Tribe and NSP jointly hosted this conference which was attended by over thirty utility executives. I can tell you from discussions with many other utility executives that the government's delayed and unnecessarily costly nuclear waste program is one of the gravest threats facing the electric utility industry and our customers today. I am encouraged, however, that there is also widespread agreement in the industry to try to help fix the problems which exist.

In 1982, Congress enacted the Nuclear Waste Policy Act which delegated to the DOE the obligation to site and build a permanent repository for high level nuclear waste from electric utilities. The Act also requires the Department of Energy to accept spent nuclear fuel for disposal beginning not later than January 31, 1998.

In order to fund DOE activities, the Nuclear Waste Policy Act established within the DOE a separate Nuclear Waste Fund financed primarily by annual fees paid by the ratepayers of nuclear utilities. To date, ratepayers have paid nearly $8 billion into this fund. NSP ratepayers alone have contributed more than $200 million.

Despite the expenditure of over $3.6 billion, the DOE has fallen far behind schedule for beginning operation of a permanent repository for nuclear waste disposal, originally promised for 1998, it is now clear that a permanent facility will not be completed before 2010, at the earliest.

The Nuclear Waste Policy Act also required DOE to submit a proposal to the Congress for the construction of a Monitored Retrievable Storage (MRS) facility for the temporary storage of high level waste.

By 1987, the Department of Energy had fallen behind the schedule established by the Nuclear Waste Policy Act for opening a permanent spent fuel disposal facility. In an effort to get the waste program back on schedule, and to help meet the need for storage beginning in 1998, Congress found it necessary to enact the Nuclear Waste Policy Act Amendments of 1987. The 1987 Amendments, among other things, linked development of an MRS facility to progress in siting a permanent disposal facility and directed the Office of the Nuclear Waste Negotiator to seek to enter into a voluntary agreement with a State or Indian Tribe that would be willing to host an MRS facility. At an MRS facility, the DOE could accept and take title to commercial spent nuclear fuel prior to the operation of a permanent repository.

Unfortunately, DOE has missed program milestone after milestone both with respect to a permanent repository and a temporary MRS facility. Just last year, the Congress eliminated all grant money for the MRS program. Today, we are no closer to having a government-built MRS facility than we were when the program began. In the best of circumstances, a government-built MRS facility could not be available until well after the year 2000.

DOE has stated that it is highly unlikely the federal government will meet its obligation to begin accepting waste in 1998. In fact, just recently, the Secretary of Energy has announced her intent to explore options for continued storage at utility reactor sites after that date. This causes us great concern.

The government's failure to keep the waste program on schedule is threatening electric consumers with unnecessary costs: Costs for on-site temporary waste storage and, in the case of our Prairie Island nuclear power plant, costs associated with the prospect of having to secure alternative supplies of power if we are forced to close one of our lowest cost power plants before the end of its useful life.

NSP's Prairie Island nuclear plant is a two unit 1060 megawatt plant with twenty years of operation left under its current Nuclear Regulatory Commission (NRC) license. Spent fuel disposal is the only issue jeopardizing its future. Spent fuel currently is stored in a storage pool in the plant. The pool will be full in 1994. In order to continue operating the plant, we need more storage capacity. In the mid-1980's, NSP looked at various options for temporary on-site spent fuel storage. Ultimately, we selected dry storage technology as the safest and most economical of the alternatives. Dry storage entails transferring the oldest and coolest used fuel from the pool into NRC approved sealed steel containers, which would then be stored next to the plant.

In August 1990, NSP requested regulatory approval for dry storage. The NRC, after a three year review of health and safety issues, and a review of the design and operation of the facility, issued our company the necessary license for the fuel storage facility.

In addition to NRC approval, Minnesota has an extensive State review and approval process for projects of this nature. After conducting a full Environmental Impact Statement on this project, the State Environmental Quality Board concluded that there were no significant environmental impacts. The Minnesota Public Utilities Commission, after a Certificate of Need hearing, concluded that the project was safe and in the best interests of the public. Unfortunately, opponents appealed the PUC decision to the Minnesota Court of Appeals, arguing that approval of the Legislature was required under existing Minnesota law. The Court determined that the intent behind the Minnesota law was to require legislative approval of any spent fuel storage facility.

Spent fuel storage at Prairie Island is temporary, yet opponents to our proposal have characterized dry storage at Prairie Island as likely to be permanent, pointing to the repeated delays in the federal nuclear waste management program. Without the approval of the Minnesota Legislature in this session, we will be forced to close Prairie Island in 1995 because we will have run out of existing on-site storage.

The government's failure to keep the waste program on schedule threatens our customers. Prairie Island produces, on average, some 20 percent of NSP customers' energy. If Prairie Island is forced to close, NSP conservatively estimates that it will cost $1.8 billion to replace the power lost. This will cause short-term customer rates to increase by approximately eight percent. Over the long term, hundreds of jobs in the region will be lost as a result of the facility.

In addition, a reliable electric supply is critical to our region of the upper Midwest. For example, during this winter's severe cold weather, NSP's nuclear plants were crucial to our system's reliability. When actual outside temperatures approached –40 degrees F., a failure in electric supply to our customers becomes not simply a matter of inconvenience.

NSP has investigated every potential initiative that could result in spent fuel being removed from our plant as soon as possible. On February 3 of this year, the Mescalero

Apache Tribe of New Mexico and NSP announced an agreement that is the first step toward establishing a private interim storage facility for spent nuclear fuel. Under the agreement, the Mescalero Apache will store fuel from participating utilities for a negotiated period of time, or until the federal government fulfills its obligation to take the fuel, whichever comes first. Utilities that use the facility will assume responsibility and liability for transporting the spent fuel to the facility and will retain ownership of the fuel while being stored. The facility will be constructed and operated in accordance with all federal safety and environmental laws and regulations and will be licensed by the NRC.

The unsatisfactory performance of the federal government regarding the waste management program has left us and many other similarly situated utilities with little choice. The Mescalero/NSP agreement gives electric utilities the opportunity to see if the private sector can do a better job of finding a temporary solutions to our waste problems than has the federal government.

While the Mescalero/NSP agreement represents an important first step toward establishing a private interim storage facility for spent nuclear fuel, it does not relieve the federal government of its obligation to begin taking fuel from utilities in 1998. Nor does it deal with the issue of the permanent disposal of high level nuclear waste.

There appears to be widespread and growing support for a private interim storage facility. Just last week, over thirty utility executives and state regulators attended a joint NSP/Mescalero conference to discuss the private storage option.

Support from utility regulators, which is critical, is also growing. Just last month, the National Association of Regulatory Utility Commissioners passed a resolution encouraging the development of private temporary spent nuclear fuel storage facilities.

In addition, since last fall, NSP and representatives from Minnesota's Department of Public Service and the Public Utility commission, have had meetings with their counterparts from Michigan and Florida to discuss interim storage options. Another meeting of the group is scheduled in early April in Detroit; the number of states represented is expected to grow.

I can assure this Committee that NSP will continue to tenaciously pursue the Mescalero project and garner additional support for it.

I strongly urge you to support the Mescalero/NSP agreement and to provide adequate funding for the permanent repository. I also urge you to make whatever program reforms are necessary to ensure that a permanent facility is completed as expeditiously as possible.

Mr. Chairman, again, thank you for the opportunity to be here today. I want to commend you and the other memebers of the Committee for devoting your time and attention to the critical issue of resolving the nation's nuclear waste storage needs. I would be pleased to answer whatever questions you may have.

STATE OF THE INDUSTRY

A Speech by James J. Howard III

Chairman, Nuclear Energy Institute

Chairman, President and Chief Executive Officer,

Northern States Power Company

Editor's Note: James J. Howard delivered the following address May 14, 1998, at the Nuclear Energy Assembly in San Francisco.

It's great to be back in San Francisco for a major meeting of the nuclear industry. We brought our annual meeting back to the West Coast this year, in part, to increase participation by NEI's international memebers – particularly those from Asia. And judging by the list of attendees, the decision to come to San Francisco was a good one. Not only do we have a number of participants from Japan, the Republic of Korea, Taiwan and China, we'll hear later this morning from Liu Zhaodong *[Loo Zsa-DONG]*, a science and technology minister in the Chinese Embassy. He'll give us a first-hand look at the world's most ambitious nuclear energy program.

Yes, it's a pleasure to be back in San Francisco for my final meeting as chairman of the Nuclear Energy Institute. During my three-year chairmanship, much has changed in the nuclear energy industry.

I'm pleased to report that nearly all of the changes have benefited our industry – not to mention our electricity customers.

First, the commercial nuclear industry is performing better than at any time in our 40-year history. In the United States, capacity factors are up, refueling outages are getting shorter, and safety is unparalleled.

Second, as the electric utility industry prepares for retail competition, nuclear power plants are controlling costs and becoming more efficient. With production costs that already rival coal – and which are far and away cheaper than those of natural gas – America's nuclear plants are well-positioned to compete in a restructured marketplace.

Add in the economic benefits of license renewal, and many nuclear power plants will be tremendous assets.

...change process known as 10CFR Part 50, Section 59; even a major realignment of the agency's structure and priorities.

We do see positive developments in the regulatory environment.

But the wheels of change move very, very slowly. In my opinion, too slowly – particularly when it comes to adopting risk-informed and performance-based approaches to regulation.

The industry has invested heavily in this area. But so far, neither utilities nor the NRC appear to be reaping benefits from it.

The industry has been working with the commission and NRC staff to address these and other issues. And they are starting to move in a positive direction. I'm pleased that frequent meetings between the commissioners and utility CEOs and nuclear officers appear to be improving communications and understanding.

When Chairman Jackson speaks to us tomorrow morning, I hope she'll discuss some of the areas where problems remain – and what it will takes to get things on a faster track.

As the industry evolves from a cost-of-service environment, the regulatory process must evolve as well. The NRC has a great opportunity to improve the regulatory process to support restructuring.

Toward that end, the industry will continue working with the NRC, Congress and other policymakers to improve the regulatory process. The United States needs nuclear energy. The nation can't meet its own clean-air requirements without it. So we must make the regulatory process as effective and efficient as possible.

No discussion about the state of the nuclear industry would be complete, of course, without talking about the federal spent fuel management program.

Clearly there's a problem here that must be solved.

As everyone in this room knows, nearly four months ago the federal government defaulted on a longstanding obligation to begin taking spent fuel from the nation's nuclear plants.

By allowing the January 31st deadline to pass without action, DOE and the Clinton administration have turned their backs on Congress – which set the deadline 16 years ago.

And they have turned their backs on the American people. The administration is keenly aware that utility customers have helped build a $14 billion Nuclear Waste Fund so DOE could fulfill its 1998 obligation. So far, all these citizens have to show for their money is a tunnel under Yucca Mountain.

I'm happy – and relieved – to report that we may not have to endure this inaction much longer.

At this very moment, Congress is working on the final version of the Nuclear Waste Policy Act. That legislation, which passed the House and Senate in differing forms last year, will establish a centralized interim spent fuel storage facility by 2003.

Although we still have a tough road ahead of us, passage of this legislation is the industry's number-…

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KRISTA SANDA
COMMISSIONER, MINNESOTA DEPARTMENT OF PUBLIC SERVICE, AND FOUNDING MEMBER NUCLEAR WASTE STRATEGY COALITION BEFORE THE HOUSE APPROPRIATIONS COMMITTEE SUBCOMMITEE ON ENERGY AND WATER DEVELOPMENT

BODY:

INTRODUCTION

Chairman Myers, members of the Subcommittee, I appreciate this opportunity to testify today and to alert you to the urgent need for Congress to reform, and fund, the U. S. civilian nuclear waste program.

This coming year's appropriations will have a major impact on how this country deals with nuclear waste for decades to come. Congress's action, or inaction, will determine whether the United States will fund an effective civilian nuclear waste program, or continue to squander billions of dollars to create a relatively small, temporary infusion of trust fund money into the present budget process. Failure to reform and fund the U. S. civilian nuclear waste program will create a tremendous financial burden for electricity consumers and taxpayers. Relying solely on the Federal Courts to address this has powerful, and painful, implications for the Federal budget and appropriations process. We must take immediate steps to provide centralized, temporary storage of high-level nuclear waste. We also must reform and fund a program lending to safe, timely, and cost-effective permanent disposal of nuclear waste from our power plants. Electricity consumers will not continue to quietly pay their money into the Nuclear Waste Fund and get nothing in return. There is a growing realization by this country's consumers, regulators, elected officials and representatives of the electric industry that we must act to change the bumbling manner in which this program has been managed over the past 25 years. New initiatives are attempting to address the management problems but it will be difficult to succeed without the commitment of this subcommittee to support the reform process with adequate funding.

CONSUMER RIP-OFF

One year ago I presented testimony to this committee on the need to fund a reformed civilian nuclear waste program. I explained how electricity consumers all pay into the Nuclear Waste Fund in every monthly electric bill. All told, American electricity consumers have paid over $11 billion dollars to date and continue to pay at a rate of about $600 million each year. This money is passed through to the Federal Government by our electric utilities for safe keeping as specified in individual contracts they signed with the U. S. Department of Energy. Congress is supposed to appropriate our money from the Fund to provide safe and timely storage and disposal of civilian radioactive waste from nuclear power plants which produce over 20 percent of our nation's electricity. Consumers have kept their end of the bargain, but not the federal government. By failing to appropriate more than a fraction of our annual payments, some in Congress have effectively diverted - - stolen if you will - - up to two-thirds of consumer's annual contractual payments to camouflage other spending in the budget process. The desire to collect money for one purpose but use it for another, plus the widespread recognition of DOE program failure has created the worst of all situations. This year Congress has severely curtailed appropriations to the DOE civilian radioactive waste program, expressing legitimate concern over its falling two years further behind for each year it operates. In response, DOE raised the percent of program overhead, raised lifecycle cost estimates, and extended its target completion date for a repository another 5 years to the year 2015 or beyond. Since then, some in Congress have threatened to cut all funding - - while still taking consumers money.

If Congress simply slashes or ends appropriations for civilian high-level nuclear waste storage and disposal, it is foolhardy to expect electricity consumers to continue paying hundreds of millions of dollar under Federal contracts for services they do not get. Progress toward receiving those services would slip even further from DOE's already dismal rate, creating billions of dollars in unnecessary costs.

Failure of the DOE program is reason for reform. It is not an excuse to take $4.2 billion of consumer payments over the next 7 years for other purposes - - creating expenses three or four times higher for American consumers and taxpayers. No course of action other than both reforming and funding the program is the only honest policy, the only sound policy, and the only acceptable policy.

ENOUGH IS ENOUGH

Nuclear Waste Strategy Coalition

Two years ago consumers, states and utilities finally realized that enough is enough. They clearly saw the nature and magnitude of the unfolding debacle in the Federal nuclear waste program. Together with Michigan and Florida, Minnesota then founded the Nuclear Waste Strategy Coalition, a group of state regulators, state attorneys general, and utilities working together to push the civilian nuclear waste program toward a safe, timely, and cost-effective conclusion. A year later we had member organizations in 13 states. Today our growing coalition has 33 member organizations in 19 states, with additional members and our 20th state anticipated within days.

The Nuclear Waste Strategy Coalition is following a three-prolonged action plan to bring about changes needed in the nuclear waste program. These actions include: holding the Federal government accountable for its nuclear waste disposal obligations for by initiating a lawsuit against DOE; supporting and encouraging development of private storage facilities to meet pressing immediate needs for away-from-reactor storage; and developing and proposing solutions to the problems in the current program.

DOE Lawsuit

Members of our Coalition play leading roles in the lawsuit pending in Federal Court against DOE by the states and nuclear utilities. The purpose of this suit is to hold the Federal government responsible for contracts signed by DOE promising to begin taking waste in 1998. Forty state agencies in 20 states, 25 investor owned utilities, and 8 municipal utilities have joined in this suit, demonstrating broad and deep concern with the DOE program. After two years of DOE maneuvering oral arguments in this case were presented before the U.S. Court of Appeals in the D.C. Circuit on January 17, 1996.

It was a good day for consumers, and a bad day for DOE. At one point Judge Ginsberg asked DOE's attorney, "So what did they get for their money? Or is this just a giant swindle from the outset? . . . They were to pay you money and you were to do nothing that you didn't want to? There is an old expression in Yiddish that translates in English to 'here's air, give me money'. That's what it sounds like."

There are widespread expectations that the Court's decision, perhaps coupled with subsequent actions, will fix responsibility for nuclear waste, including fiscal responsibility, firmly on the Federal government.

Private Initiatives

Members of the Nuclear Waste Strategy Coalition have repeatedly pointed out the wisdom of having another, private volunteer program for temporary nuclear waste storage in addition to a government program. A non-government project will provide valuable technical and managerial innovation to both challenge the government program and provide it with examples to emulate. This is especially important to promoting overall cost-effectiveness.

Let me cite one example. Coalition members have been instrumental in bringing together the Mescalero Apache Nation, Northern States Power Company, and several other utilities to explore development of a private storage facility for nuclear waste. That project continues to advance and has now formed a corporate entity. Before March, 1995, DOE estimated its interim storage facility costs as being $1.042 billion. Then, after meeting with members of the Mescalero Private Fuel Storage Project and reviewing their $139 million cost estimate, DOE cut its own cost estimate nearly in half to $567 million.

In addition, if the Federal government's program fails to be timely, safe, or cost-effective, a second, volunteer site may provide a short term option, providing valuable time to form and implement a contingency plan. Such a site lowers the risk of overall program failure caused by impediments of nature, law, technology, or other factors that may be unique to a single site. It may also provide additional capacity, augmenting storage at the government program's site. For these reasons, such initiatives must continue to be encouraged and pursued.

Reform Legislation Pending Before Congress

The 104th Congress presents the window of opportunity for comprehensive legislative reform of the nuclear waste program. Through the actions such as the states' and utilities' lawsuits against the Department of Energy, the private spent-fuel storage project, and through high-profile state cases like Minnesota's Prairie Island case, the continuing failure of the program run by the Department of Energy is becoming widely recognized. There is a widespread consensus on the need for Congressional action. Representatives Upton and Towns are to be commended for introducing H.R. 1020, the Integrated Spent Nuclear Fuel Management Act of 1995. Two hundred and sixteen (216)

Congressmen now cosponsor this proposal. Clearly it is time to advance this vital and comprehensive legislation to the House floor and to pass it. Senator Crag, Senator Grams and Senator Johnston must also be commended since each has introduced legislation that addresses important problems in the nuclear waste program. Their necessary and important steps have brought this critical issue to the forefront and fostered discussion in the Senate. It is my understanding that significant committee action will advance legislation there as well in the next few weeks.

Despite these encouraging and long overdue developments, we must recognize that there are powerful special interests who would prefer to do nothing. Some suggest that we are asking you to rush to judgment. If the 12 years in which we have wrestled with this dilemma is not enough time to see what needs fixing, no amount of time will be enough. Other special interests wrongly and loudly assert that reforming the nuclear waste program is a "budget buster" and that Congress has yet to find a way to pay for it. Let me make it perfectly clear that electricity consumers in Minnesota and throughout the nation have already paid, and continue to pay for civilian nuclear waste storage and disposal. This vital program reform only affects the budget to the extent that planners had hoped to divert electric consumers payments from the Nuclear Waste Fund for other spending purposes! Furthermore, reform opponents completely ignore the fact that a properly reformed program will run far more cost effectively, and there is a real risk of even greater shocks to the budget and appropriations process if Congress fails to take action now.

IMMEDIATE ACTION IS NECESSARY

Failure of the Federal government to fulfill its obligations beginning in 1998 means that for the foreseeable future radioactive waste will remain at 110 reactors in 73 locations in 34 states and at tremendous additional costs. If waste does not begin moving to a centralized location by 1998 additional costs will include the building and prolonged operation of many storage sites instead of a single site, the possible early shut down of power plants, and additional decommissioning expenses.

Delaying reform of the civilian radioactive waste program for even one or two years has real and substantial costs to our nation. If the 104th Congress fails to authorize centralized temporary storage for the nation's civilian radioactive waste, as H.R. 1020 provides, it is unlikely to be addressed before 1997 or 1998. By 1998, the Congressional

Quarterly estimates that 26 of the nation's 110 reactors will have already made provisions for on-site storage. Spending decisions will be concluding by 1998 concerning storage for half of the nation's reactors. Billions of dollars will have been spent and the opportunity to avoid huge unnecessary expenses will be lost.

In fact, these costs are already beginning to occur and they are guaranteed to continue growing. They are not some vague and future problem. They are part of today's cash flow and the present budget and appropriation discussions. Since we only have five minutes today, let me briefly present an estimated summary of the really big costs. I trust your staff will have the opportunity in the upcoming weeks to explore these costs more fully with members of the Nuclear Waste Strategy Coalition.

THE BOTTOM LINE: COSTS OF FAILURE

First, let's look at the costs for additional storage at nuclear power plants. A sampling of data from around the country indicates that implementing dry cask storage facilities at 73 power plant locations could easily result in costs of $6 billion to $8 billion – for the first twenty years. Unless the DOE program reverses its history of failure – and the opening date for a repository gets closer instead of farther away with each passing year – waste may remain at plant sites for many more decades. In addition, we should note that present DOE contracts with utilities assume an acceptance rate of 3000 MTU per year over a 45 year period. Additional costs of maintaining 73 spent fuel facilities for additional decades appears to be between $1.5 and $3.3 billion per decade. Even in the value of today's dollars, these dry cask storage costs approach, or exceed $10 billion. They would likely be even higher at the time of performance.

Northern States Power Company
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Roy H. Beralund
Vice President
Commercial Operations

June 7, 1983

The Honorable Kenneth F. Plumb
Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: Application for Approval of Change in
Accounting Method Used to Recover Spent
Nuclear Fuel Disposal Costs
Docket No. ER83-

Dear Mr. Plumb:

Please find enclosed for filing six copies of the application of Northern States Power Company (NSP(M) or Company) requesting approval of a change in the method the Company currently uses to account for the costs associated with disposing of spent nuclear fuel. The change in-accounting method being sought would: (1) eliminate a portion of the Company's current sinking fund accrual which is used to recover the costs of transporting *spent* nuclear fuel to a permanent disposal site along with the costs of permanent disposal; and (2) substitute the 1.0 mil per kWh assessment to recover these costs, as established by the Department of Energy (DOE) in accordance *with the* Nuclear Waste Policy Act of 1982.

Although the Company is not filing a change in rate schedules, the proposed change in accounting method will have an impact con its wholesale customers' rates. This impact will be reflected in a reduced fuel adjustment cost (described in more detail below) and a resulting decrease in customers' bills. The Company hereby requests the Commission's approval of this resulting rate change as well as the accounting methodology. A list of the affected wholesale customers and the FERC designations of the contracts under which they are served is attached hereto as *Exhibit* A. Also attached as Exhibit R, for the Commission's information, are copies of the currently effective rate sheets which include the relevant fuel clause provisions (Wholesale Firm Power Service, Sheet No. 3-3, Wholesale Load Pattern Power Service, Sheet Nos. 3-6 and 3-7).

This filing is being made concurrently with filings by NSP(M)'s subsidiaries, Northern States Power Company (Wisconsin) and Lake Superior District Power Company.

These filings are all related because the total system fuel costs are used in the determination of the fuel clause adjustment for all three companies.

The Company's current method for recovering the costs of disposing of spent nuclear fuel is based on a sinking fund accrual which was established in August 1981. This method includes four estimated disposal cost components established by the DOE in May and October of 1980. These cost components are:

(1) Transportation to away-from-reactor storage,
(2) Away-from-reactor storage,
(3) Transportation to permanent fuel disposal, and
(4) Permanent fuel disposal.

The first two components represent interim, away-from-reactor, storage costs. The last two components represent permanent disposal costs.

The Company's projected sinking fund accrual for the twelve month period beginning April 7, 1983 provides approximately $20 million annually, or 1.88 mils per nuclear *kWh* generated, to fund all four of the costs listed above. Of the total 1.88 mils, approximately 1.75 mils is for the permanent disposal costs (components 3 and 4), and the remaining 0.13 mils is for interim, away-from-reactor, storage costs (components 1 and 2). A development of these figures is shown in Exhibit C, attached.

NSP (M) provided the Commission with a description of the sinking fund accounting methodology in its 1981 wholesale rate filing, Docket No. ER81-651-000. An uncontested settlement reached in that case was approved by the Commission on April 29, 1982. In response to FERC Staff concerns regarding potential modifications to the nuclear fuel accounting, the Company agreed that it would not implement a change in its nuclear fuel disposal cost recovery through the fuel adjustment clause, without a filing with the Commission (NSP(M)'s December 30, 1981 Statement Explaining and Supporting Settlement Agreement, P. 2).

Recently, in accordance with the Nuclear Waste Policy Act of 1982, the DOE implemented a program for disposing of spent nuclear fuel. This program includes two types of charges which are assessed to utilities to recover the costs of disposing of spent nuclear fuel.

The first of these charges is a one-time fee to help cover the costs of disposing of fuel burned before April 7,

1983. The Company *has* evaluated its one-time fee obligation and determined that NSP(M) will be required to enter into a contract with DOE by June 30, 1983, for fee obligations totaling $93.4 million. The Company has collected, as of April 7, 1983, $94.1 million to cover the cost of both interim and permanent disposal of its fuel burned before this date. Until new information becomes available concerning the costs of interim, away-from-reactor, storage the Company proposes that the $700,000 difference between the funds collected prior to April 7, 1983 and its one-time fee obligation be retained in Account 120.5 in order to help cover these interim, away-from-reactor, storage costs.

The second type of charge included in the DOE program is a 1.0 mil. per kWh assessment which will cover the permanent disposal cost components of all nuclear fuel burned after April 6, 1983. This new assessment procedure represents a revision in the permanent disposal cost components listed above. It is this revision in the amount and the method for recovering the permanent disposal costs of fuel burned after April 6, 1983 which the Company is addressing in this filing.

Consistent with its representation in Docket No. ER81-651-000 described above, NSP (M) proposes to reflect this new permanent disposal assessment in this filing by reducing its current sinking fund accrual by approximately 1.75 mils per kWh and substituting a 1.0 mil per kWh assessment method for recovering these permanent disposal costs. The sinking fund would continue to accrue approximately 0.13 mils per kWh which reflects the present estimate of interim, away-from-reactor, storage cost.

The net effect of substituting the 1.0 mil assessment for the 1.75 mil sinking fund accrual, will be to reduce the costs of nuclear fuel disposal which are booked in Account 518. Since the costs booked in Account 518 are recovered through the Company's fuel adjustment clause mechanism, the result of this change will be to reduce the fuel cost in the adjustment clause. (See Exhibit B attached hereto and described above). The reduction in the fuel adjustment costs will be reflected in lower bills to NSP(M)'s wholesale customers.

The impact of this reduced fuel cost on NSP(M) wholesale customers would be an annual reduction of approximately $245,000 or 0.3 mils per kWh, based on budget data for the period of April 7, 1983 through April 6, 1984. (See Exhibit C). Pursuant to Section 1.7 of the Commission's Regulations the Company hereby requests a waiver from the filing requirements of Sections 35.13 and 35.14, inasmuch as this is not a proposal to change rate schedules, base rates or the base cost of fuel in the fuel clause.

Because the effective date for the 1.0 mil per kWh assessment established by the Nuclear Waste Disposal Act is April 7, 1983, the Company requests that the proposed accounting method and corresponding rate change be made effective as of that date. By exercising its discretion and authority pursuant to Section 205(d) of the Federal Power Act and Sections 1.7, 35.2(e), and 35.11 of Commission Regulations to grant this request for a retroactive effective date, the Commission will allow NSP(M)'s customers to fully benefit from the reduction in fuel adjustment cost authorized by the Nuclear Waste Disposal Act. If the Commission approves the Company's request for a retroactive effective date, the lower nuclear fuel disposal costs for the period following April 6, 1983 would be booked as soon as practicable. NSP(M)'s customers would realize the benefits of the reduced costs beginning with lower fuel clause adjustments in the months thereafter.

If the Commission does not grant NSP(M)'s request in this regard, the Company requests that this filing become effective on or before August 5, 1983. In the event that there is any need to suspend the effectiveness of this filing beyond the proposed effective date, the Company requests that the suspension period be no more than the minimum one day permitted by statute.

NSP(M) knows of no other Commission filing requirements that need to be waived to allow this filing to become effective. However, we request that if such requirements exist they be waived as well by the Commission, under Section 1.7 of its Regulations.

The Company requests that all Commission orders and correspondence, as well as pleadings and correspondence from others, be served on the following:

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The following is a list of documents submitted as a part of this filing:

1. A check in the amount of $100.00 for the filing fee;
2. Exhibit A - a list of the affected wholesale customers and their FERC rate schedule designations;
3. Exhibit B - copies of currently effective rate sheets which include relevant fuel clause provisions;
4. Exhibit C - computation of rate impact from change in permanent nuclear fuel disposal cost accounting;
5. A list of the customer and state commission addresses to whom a copy of this filing has been mailed;
6. A form of the notice of the filing for publication in the Federal Register.

Very truly yours,

/s/

Roy H. Berglund

Enclosures

STATEMENT OF HON. HENRY M. JACKSON, U.S. SENATOR FROM THE STATE OF WASHINGTON

Today's hearing before the Senate committee on Environment and Public Works is to address the important legislation now before the Senate on nuclear waste management policy. I commend Senator Gorton for arranging this hearing, and I am sure that he will play a key role in the development of the legislation, S. 1662, as it is considered by the Environment and Public Works Committee. I regret that a long-standing commitment in Seattle precluded my being able to attend this hearing, but I will review the transcript with interest for suggested improvement in S. 1662 which was also referred to the Energy and Natural Resources Committee on which I serve as Ranking Minority Member.

I have a few key points that I wish to make regarding the nuclear waste problem.

For many years, the Atomic Energy Defense Programs of the Department of Energy have performed crucial national security-related functions at the Hanford Reservation for acquiring special nuclear materials. An unavoidable by-product of these activities is highly radioactive waste generated in the production reactors.

These high-level wastes have been stored in interim facilities which were intended for relatively short periods of storage in comparison the period of significant radioactivity found in these wastes. Typically, the tanks at Hanford for storage of liquid wastes were designed for an interim storage period of about 20 to 30 years.

While these highly radioactive wastes have been stored without any significant threat to public health and safety, in the past there have been a few incidents at the Hanford Reservation of leakage from some of the tanks storing such wastes. In recent years, a program to remove most of the liquids and selected heat-generating radioactive elements has improved the situation by reducing the likelihood and possible extent of near-term problems with these older single-shell tanks. However, the problem of the permanent disposal of these wastes remains to be solved.

The problem is a substantial one and will require careful planning to achieve possible solutions. Federal expenditure levels may be constrained over the next few years by the efforts to control federal spending. However, it is essential that a program for the disposal of these wastes in a permanent manner be initiated and carried out so that over a period of the next 15 to 25 years, the wastes currently stored in the interim facilities at Hanford are safely isolated from the biosphere for a very long period of time.

The Department of Energy will not be starting from scratch in this effort to develop a program plan for treating the military-related high-level wastes. There have been several studies and reports on how to manage these wastes. These reports describe the high-level wastes resulting from atomic energy defense activities stored at the Hanford Reservation. They also set forth alternate plans to be considered, describe various technologies that may be applied to solidifying the wastes, set forth risk assessments related to the activities connected with the permanent disposal of the wastes, and give cost estimates associated with the alternative plans.

The Hanford site has more than 60 percent of the high-level wastes resulting from atomic energy defense activities in the United States. Even when the high-level wastes that would result from reprocessing spent nuclear fuel from commercial nuclear powerplants is added to the current inventories of atomic energy defense high-level wastes, the high-level wastes stored at Hanford constitute about 50 percent of the nation's entire high-level waste inventory. In other words, the Hanford Reservation already has more than its fair share of the nation's burden of high-level waste.

It is time that we put in place a program to begin to deal with this existing problem given its long standing, dating back nearly 40 years. I am not saying that we are not doing things in the defense waste program, but rather that there is no integrated program with specific dates for making programming decisions and establishing detailed program milestones so that the people in the State of Washington will have some measure of the federal commitment to the disposal of these interim-stored wastes.

I believe that the people in the State of Washington have been making an important contribution to our national defense for a very long time by accepting the storage in interim facilities of the high-level wastes from atomic energy defense activities. Continued public support is important for these ongoing activities. To help maintain that support, we must begin now to ensure that a permanent solution is found for the wastes that are already stored in this state.

I also think it is important that there be equitable sharing in the national responsibility for high-level wastes. The prospect of a civilian waste repository in this state at a time when a final solution for the currant high-level waste inventory is not being pursued vigorously is not apt to find broad public support. Moreover, there is an existing low-level waste facility for commercial disposal of wastes from commercial activities near Richland. Is is performing a critical need, but it adds to the public perception that a sufficient contribution to the national nuclear waste problem is being made by the State of Washington.

The focus of today's hearing is on legislation primarily dealing with the civilian nuclear waste problem. The question of what can and should be done with such nuclear waste is of great concern to the general public. Thus, I believe it is important for the Congress to provide direction to the Department of Energy through legislation to assure the public that the problem is being properly addressed by the federal government.

In the last Congress along with Senators Johnston and Church, I introduced legislation aimed at resolving a number of problems relating to spent nuclear fuel and wastes from civilian nuclear activities. Unfortunately, comprehensive legislation was not enacted even though it passed both Houses. However, we were able to enact the part of the comprehensive legislation which addressed the issue of low-level waste disposal. This law permits the states to enter into compacts for regional disposal of low-level waste.

I think it is important to note that the states in the northwest have already successfully negotiated a regional compact for the disposal of low-level waste, and I believe that the Congress will turn its attention shortly to consideration of the approval of this compact.

In this Congress, Senator Johnston and I reintroduced a comprehensive nuclear waste bill, S. 637, addressing many of the same points encompassed in the legislation passed by the Senate last year. Senator McClure and others introduced S. 1662 in September which is similar to S. 637 in general concept but reflects different perspectives in certain instances based upon the policies of the Reagan administration. Some of these changes are improvements which I endorse.

On October 21, 1981, the Committee on Energy and Natural Resources ordered S. 1162 reported with some amendments which represented language closer to the concepts in S. 637. While I believe additional changes need to be made in S. 1662 as reported. I did not object to its being reported promptly to ensure consideration by the full Senate at an early date. The Committee on Energy and

Natural Resources may meet again and approve committee amendments to prefect further the bill as ordered reported.

I wish to point out an important aspect of the pending legislation. A requirement for a proposal on monitored retrievable storage facilities to be submitted to the Congress is contained in Title V of S. 1662 and Title IV of S. 637. While this approach to the long-term disposal of high-level waste is not necessarily preferable to permanent geologic disposal, I believe that it deserves careful consideration. A monitored retrievable storage facility which could safely store high-level waste for the most critical period of the first 300 years is not dependent upon finding a near-perfect geologic medium. In fact, a possible approach to such storage has been tested by the facility in Gable Mountain on the Hanford Reservation.

An important point is that such a facility could be located in virtually any state in the nation. The National Governors' Association believes that it is essential to have a regional approach to the disposal of high-level wastes, just as we are trying to foster a regional solution to the low-level waste program.

The governors have endorsed the idea of not making one or perhaps two states the recipients of the nation's high-level wastes from both military and civilian activities. The likelihood is that over time, three or four facilities for the permanent disposal of high-level waste will be required. Finding a suitable geological medium for disposal of high-level waste in each region of the country may not be possible. In which case, it may be desirable to consider a monitored retrievable storage facility for meeting that region's needs for disposal of high-level waste.

Title VII of S. 1662 provides for a role for states participation in the development of a repository of a monitored retrievable storage facility for disposal of high-level wastes and spent fuel. It provides an equivalent role for an affected Indian tribe in a state where either type of facility is to be located. This title, along with Section 404 of the bill dealing with site characterization activities, will provide not only a meaningful role for a governor and any affected Indian tribe I the all-important period prior to the Department of Energy's applications to the Nuclear Regulatory Commission for a construction permit, but also for all ensuing activity. Moreover, the Congress will provide further protection for the states and Indian tribes not only through the review process contained in the final legislation, but also through the funding of any disposal facility for which the Secretary proposes to build.

There are many facets to the civilian nuclear waste disposal issue which the Congress is trying to address.

We must resolve the problem of spent fuel storage by deciding when and if the Secretary of Energy can relieve a utility of spent fuel which is accumulating at operating nuclear powerplants.

We must address the question of whether spent fuel will be stored until a reprocessing capability is established in this country, or whether some spent fuel will be disposed of.

We must decide on how to achieve the proper balance in a schedule for disposal of high-level wastes between the competing objectives of protecting public health and safety and demonstrating that disposal of nuclear waste is possible.

We must structure the legislation in a way to ensure that no individual state believes that they have been unfairly singled out as a site for a nuclear wastes disposal facility.

We must provide an opportunity for interaction with the Secretary of Energy to ensure that the concerns of the people of the affected state are properly addressed so as to maintain public acceptance of a disposal facility in that state.

We must also provide a funding mechanism for these activities where the full cost of the disposal of civilian nuclear waste is borne by those who derive the benefits from nuclear power, as opposed to taxing the general population.

These are the key issues that must be resolved by any legislation addressing the nuclear waste problem. I hope that we can enact legislation in this Congress to help solve the nuclear waste problem confronting this nation. I believe this problem must be solved in a safe way at an early time in order to maintain public acceptance for the use nuclear power in our country. I believe that the problem is technically solvable. However, I believe that we must find solutions in a way that maintains public credibility that the nuclear waste problem is truly behind us. I also believe that there must be an equitable sharing on a regional basis for disposing of the nation's nuclear waste to ensure that no one state feels unfairly burdened.

Senator GORTON. At this point I'd like to ask Congressman Morrison for any opening statement he may have.

Calendar No. 393

97th Congress	SENATE	Report
1st Session		No. 97-282

NATIONAL NUCLEAR WASTE POLICY ACT OF 1981

November 30, 1981 – Ordered to be printed

Mr. Simpson (for Mr. McClure), from the Committee on Energy and Natural Resources, and on behalf of Mr. Simpson, from the Committee on Environment and Public Works, submitted the following

JOINT REPORT

Together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany S 1662]

The Committees on Energy and Natural Resources and Environment and Public Works, to which was jointly referred the bill (s. 1662) to establish a limited program for Federal storage of spent fuel from civilian nuclear powerplants, to set forth a Federal policy, initiate a program, and establish a national schedule for the disposal of nuclear waste from civilian activities, and for other purposes, having considered the same, each committee reports favorable …

FULL COST RECOVERY

I fully support the Chairman in his effort to assure that the Federal Government recovers the cost of the nuclear waste programs included in this bill from nuclear power supplied ratepayers. However, to achieve this goal, the language in title VI must be clarified to include such costs as site surveying, waste disposal R. & D., and impact assistance. Further, the 1.0 mil fee should be adjustable to account for future inflation and technical uncertainties.

. . . The bill includes several new or modified concepts from the bill passed by the Senate in the last Congress. One of the most noteworthy of those is the proposal in title VI for an assured full-cost recovery by the Federal Government from nuclear-power-supplied ratepayers for the nuclear waste programs included in the bill. By establishing a mandatory 1 mil-per-kilowatt-hour user's fee on nuclear generated electricity, this bill for the first time would provide a direct financial linkage between the beneficiaries of nuclear power and the cost for interim management and ultimate disposal for nuclear wastes.

Title VI, provides for a fee, initially set at 1 mil per kilowatt hour, which would be charged on the production of electricity from nuclear powerplants. Receipts from this fee would be placed in a separate account in the Treasury established solely for this purpose and would then be appropriated for the waste program on an annual basis. According to the Congressional Budget Office this fee is adequate to cover the costs of this legislation well into the 1990's. However, the bill requires that the adequacy of the fee be reviewed on an annual basis, and the fee could be modified in the future if receipts fell below costs of the program.

This funding mechanism would provide an assured source of funds to carry out the programs and would eliminate not only annual budgetary perturbations in an evermore constrained Federal budget, but the too often repeated shifts of policy direction under succeeding administrations. The nuclear waste policy, programs and required financing would be statutorily fixed and quite predictable under this approach. ...

Mr. JACKSON. Mr. President, the bill before us provides a means of funding the ongoing research and development activities and the construction and operation of nuclear waste facilities resulting from civilian nuclear powerplants. In this formulation the full cost of such activities is borne by those who derive the benefits from the nuclear powerplants; namely, the ratepayers, as opposed to the taxpayers. This formulation is proper, but it also puts the burden on the Federal Government in conducting the nuclear waste program to insure that the activities are conducted in a way to minimized costs to the ratepayers consistent with preserving the public health and safety in relation to nuclear waste repositories. In that regard, I believe that the test and evaluation facility as envisioned in this bill at the present time could represent an expensive sidetrack to the program with little return to the ratepayers' interest in insuring the development of repositories at an early time at the least cost.

97th Congress |HOUSE OF REPRESENTATIVES | Re 97
1st Session | | 111 Part 1

HIGH LEVEL RADIOACTIVE WASTE MANAGEMENT AND POLICY ACT

Mr. Fuqua from the Committee on Science and Technology,
submitted the following

REPORT

Together with

ADDITIONAL AND DISSENTING VIEWS

Including ____________the Congressional Budget

. . . Third, the fact that the users of nuclear energy will pay a relatively modest fee, estimated to be about 1 mil per kilowatt hour, to pay for the Test and Evaluation Facility and the civilian geologic repository, should eliminate any criticism that this is a Federal subsidy for nuclear power.

Marilyn L. Bouquard.
Robert A. Roe.
Ronnie G. Flippo.
Robert A. Young.
Richard C. White.
Harold L. Volkmer.
Ralph M. Hall.

Larry Winn, Jr.
Barry M. Goldwater, Jr.
Manuel Lujan, Jr.
Robert S. Walker.
Edwin B. Forsythe.
William Carney.
Judd Gregg.
Raymond J. McGrath.
Joe Skeen.
Jim Dunn.
Bill Lowery

Calendar No. 393

97th Congress | SENATE | Report
1st Session | | No. 97-282

NATIONAL NUCLEAR WASTE POLICY ACT OF 1981

November 30, 1981 – Ordered to be printed

Mr. Simpson (for Mr. McClure), from the Committee on Energy and Natural Resources, and on behalf of Mr. Simpson, from the Committee on Environment and Public Works, submitted the following

JOINT REPORT

Together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany S 1662]

PURPOSE

The fundamental purpose of the National Nuclear Waste Policy Act of 1981 is to establish the policy of Federal responsibility for the interim storage of commercial spent nuclear fuel on a limited basis, and for the long-term storage and disposal of commercial high-level nuclear waste and commercial spent fuel. It provides a mechanism by which States and Indian tribes participate in health and safety matters relating to these efforts. A Federal program to implement these policies is established and is financed through a mandatory fee on electricity generated by civilian nuclear power is also established.

FULL COST RECOVERY

I fully support the Chairman in his effort to assure that the Federal Government recovers the cost of the nuclear waste programs included in this bill from nuclear power supplied ratepayers. However, to achieve this goal, the language in title VI must be clarified to include such costs as site surveying, waste disposal R. & D., and impact assistance. Further, the 1.0 mil fee should be adjustable to account for future inflation and technical uncertainties.

NUCLEAR WASTE DISPOSAL

JOINT HEARINGS
BEFORE THE
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
AND THE
SUBCOMMITTEE ON NUCLEAR REGULATION
OF THE
COMMITTEE ON
ENVIRON MENT AND PUBLIC WORKS
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
S. 637

A BILL TO ESTABLISH A LIMITED PROGRAM FOR FEDERAL STORAGE OF SPENT FUEL FROM CIVILIAN NUCLEAR POWERPLANTS, TO SET FORTH A FEDERAL POLICY INITIATAT A PROGRAM FOR THE DISPOSAL OF NUCLEAR WASTE FROM CIVILIAN ACTIVITIES, AND FOR OTHER PURPOSES

S. 1662

A-193

A BILL TO ESTABLISH A LIMITED PROGRAM FOR FEDRAL STORAGE OF SPENT FUEL FROM CIVILIAN NUCLEAR POWERPLANTS, TO SET FORTH A FEDERAL POLICY, INITATE A PROGRAM, AND ESTABLISH A NATIONAL SCHEDULE FOR THE DISPOSAL OF NUCLEAR WASTE FROM CIVILIAN ACTIVITIES, AND FOR OTHER PURPOSES

OCTOBER 5 AND 6, 1981.

Energy Committee Publication No. 97-62

Environment Committee Publication No. 97-H40

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Resources and Environment and Public Works

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The CHAIRMAN. What will be the revenues of the mandatory fee on nuclear electricity?

Dr. BREWER. The one mil per kilowatt-hour provision in the bill is quite sufficient.

The CHAIRMAN. That would cover all the operating costs of the program envisioned in the bill?

Dr. BREWER. Yes, sir.

The CHAIRMAN. Would there be any need for direct appropriations or borrowing authority from the Treasury to be paid back from the special reserve?

Dr. BREWER. There is some question about the very near term. Your bill provides for previous year appropriations to be put into the fund, that is, unexpended appropriations, and then borrowing authority from the Treasury, and then the 1 mil per kilowatt-hour revenue stream.

We are not certain exactly what fiscal years 1983 and 1984 would look like.

The CHAIRMAN. Will you be able to give us that estimate?

Dr. BREWER. Yes, sir.

The CHAIRMAN. Are there any precedents for such a fee?

DR. BREWER. I will have to answer that for the record. (Subsequent to the hearings Dr. Brewer supplied the following:) We are unaware of any precedent for a Federally-mandated surcharge on electricity rates.

The CHAIRMAN. Is it your opinion the public utility commissions will automatically pass such a fee through to the consumer?

Dr. BREWER. We have asked a number of our nuclear utilities. The answer is yes. They feel they will. In the waste management area they are waiting for some Federal schedule for collection of fees. They are in no man's land at the present time. They have no way of ascertaining the appropriate passthrough. A Federal schedule of fees would be most helpful.

The CHAIRMAN. In determining a possible site, does the DOE take into account such factors as population density?

Dr. BREWER. Yes, sir.

The CHAIRMAN. What weight is that given? Is that a major consideration or just another one of the factors on a long list of factors?

Dr. BREWER. It is one of many factors, Senator.

The CHAIRMAN. Does population density automatically take a site out of consideration?

Dr. BREWER. No.

The CHAIRMAN. Have any States refused to aloe DOE to survey for potential sites?

Mr. MEYERS. Yes, sir

The CHAIRMAN. In how many instances has DOE agreed to refrain from site surveys within a State?

Mr. MEYERS. This happened under past administrations. I know of two instances where we were asked not to conduct surveys and we did not.

The CHAIRMAN. Would the provisions for a national site survey in this bill negate those agreements?

Mr. MEYERS. I believe so.

Summary Statement of Sherwood B. Smith, Jr.

Mr. Chairman and Members of the Committee:

My name is Sherwood Smith, I am Chairman of the Board, Chief Executive Officer and President of Carolina Power & Light Company. My company provides electric service in a 30,000 square-mile area with a population of about 3-1/2 million people in North Carolina and South Carolina.

I am pleased to appear today to discuss S. 637 and S. 1662. In addition to representing our own Company, I testify today on behalf of the American Nuclear Energy Council, of which I serve as Chairman of the Board; the Edison Electric Institute, of which I am Chairman of its Policy Committee on Governmental Affairs; and the Utility Nuclear Waste Management Group, a Group of 39 electric utilities of which Carolina Power & Light Company is a member.

Senators, we have submitted to your staffs a detailed prepared statement. I would ask that the entire text of that statement be included in the record of this hearing. As you requested in your letter inviting me to testify, we will provide your staffs with a section-by-section analysis of S. 1662 for the record in the next few days. Specific improvements appear to be needed in several sections of the bill, and these will be pointed out in this analysis.

. . . were involved in expanding spent fuel storage capacity. In fact, 15 reactors were reracking for a second time and 3 reactors were undergoing a third reracking. However, as you know, prior to 1977 utilities had planned to ship spent fuel to reprocessing facilities, and did not contemplate or provide for significant spent fuel storage capacity on site. Some of the older nuclear plants, H. B. Robinson among them, simply must look elsewhere for spent fuel storage. This short-term problem was created by an abrupt shift in Government policy in banning reprocessing, and notwithstanding a change in Administrations and policy, we still need Government assistance to provide an interim solution to a problem of the Government's making. However, as provided for in S. 1662, the cost of this interim spent fuel storage would be borne by those utilities utilizing that service. We certainly agree with this provision.

Perhaps the most novel aspect of S. 1662 is the financing arrangements in Title VI. A mandatory fee in the amount of one mil per kilowatt-hour of nuclear generated electricity is proposed to be collected by utilities operating nuclear plants. The amount collected would finance the implementation of commercial nuclear waste management facilities. We note that if such a charge had been levied during 1980, the amount collected would have been more than $250,000,000. Based on current projections of nuclear power plants commencing operations in the new few years, by 1990 a fee of one mil per kilowatt-hour would generate over $800,000,000 in that year. This appears to be a reasonable estimate of the necessary financial requirements for an adequately funded waste management facility, and, in fact, may be more than what is required.

We in the utility industry are not enthusiastic about serving as tax collectors for the Federal government; in fact, we view it as a undesirable precedent. We also do not view this scheme as the most equitable financing arrangement. Since a different number of kilowatt-hours will be generated by the same amount of fuel in different plants, depending on design differences, the length of time between refueling outages and the operational history of the plant during each fuel cycle, a different feel will necessarily be collected for the same number of kilograms of spent fuel generated from different plants. Furthermore, since the fee proposed in Title VI of S. 1662 would only be collected prospectively, these future payments do not accommodate the existing spent fuel inventories.

On the other hand, the assessment of a one mil per kilowatt-hour fee has the distinct advantage of simplicity, ease of administration, certainty of an equal assessment to all beneficiaries of the electricity from nuclear fuel, and it ensures that the waste management program will go forward in a timely manner with adequate funding. Thus, on balance, I believe that the utilities would be willing, somewhat reluctantly, to support such a mandatory fee on the electricity generated from nuclear power in return for the firm contractual commitment of the Federal government to take title to the radioactive waste or spent fuel for disposal. The fee should appropriately be stated as a cost component of fuel to be recognized as an operating expense.

We also suggest that a one-time fee be paid into the waste management fund at the time of delivery of spent fuel or radioactive waste from spent fuel removed from reactor cores prior to enactment of this Act. Otherwise, future customers utilizing nuclear generated electricity would pay for disposal of spent fuel from which they received no benefit. Most utilities have taken into account the need to make such a future payment on spent fuel already removed from the reactor of their operating nuclear plants. Therefore, to the maximum extent practical, the actual beneficiaries of nuclear fuel would pay for the disposal costs.

We firmly believe that the legislation should authorize and direct the Secretary of Energy to enter into contracts with all nuclear power plant operators by which the Government agrees to take title to and responsibility for radioactive wastes or spent fuel by a specific time, in return for the commitment of the utility to collect from its customers and pay to the Treasury a fee of one mil per kilowatt-hour of nuclear generated electricity for all nuclear fuel removed from nuclear reactors after the enactment of this bill. The contract should require a fee, generally equivalent to an average one mil per kilowatt-hour charge, to be paid by the management to ensure the program is operated on a sound financial basis. In fact even under a DOE administered program, the utility users of the waste management services should be provided a mechanism for input to the financial administration of the program.

In summary, with regard to the financial arrangements in S. 1662, while the electric utilities want to make it clear that they are concerned about the precedent of collecting a tax for the Federal Treasury, we recognize that nuclear waste management is a unique Federal responsibility resulting from the joint effort of the government and industry to utilize nuclear energy for the public benefit. Thus, we view this financing arrangement not as a precedent, but rather as an innovative mechanism for ensuring the financial viability of a successful long-term Federal waste management program. Since the service will be provided to the utilities, we believe that the utility industry should be afforded a direct opportunity to influence the direction of the financial commitments of the waste management program that is financed from fees paid by our customers.

In conclusion, we cannot emphasize strongly enough the need for action by Congress this year in implementing a Federal waste management program. Interim storage capacity for spent fuel should be acquired as soon as possible. A permanent repository site should be selected and a repository constructed on a timely schedule. An integrated test and evaluation program to demonstrate the feasibility of the technology for the public is an . . . (end of document)

Mr. Chairman and Members of the Committee:

My name is Sherwood Smith. I am chairman of the Board, Chief Executive Officer and President of Carolina Power & Light Company (CP&L). My company provides electric services in a 30,000 square mile area with a population of about 3 1/2 million people in North Carolina and South Carolina.

I am pleased to testify today on S. 637 and S. 1662 on behalf of the American Nuclear Energy Council (ANEC), of which I serve as Chairman of the Board; the Edison Electric Institute (EEI), of which I am Chairman of its Policy Committee on Government Affairs; and the Utility Nuclear Waste Management Group (UNWMG), of which CP&L is a member. ANEC represents more than 100 organizations having an interest in nuclear power. The member utilities of EEI provide about 78 percent of the nation's electricity and serve over 67 million customers. The UNWMG is comprised of thirty-nine utilities with nuclear interests. The purpose of the Group is to monitor the Federal Government's programs relating to nuclear waste management and, where possible, assist or influence the expeditious implementation of sound programs.

What we propose to do here today is to emphasize those points regarding federal policies for spent fuel storage and high-level radioactive waste disposal which are of particular interest to us. We would also like to discuss these issues in light of the bills which are presently before these Committees. S. 637 is similar to S. 2189, which was passed overwhelmingly by financial requirements for an adequately funded waste management facility, and, in fact, may be more than what is required.

We in the utility industry are not enthusiastic about serving as tax collectors for the Federal government; in fact, we view it as a undesirable precedent. We also do not view this scheme as the most equitable financing arrangement. Since a different number of kilowatt-hours will be generated by the same amount of fuel in different plants, depending on design differences, the length of time between refueling outages and the operational history of the plant during each fuel cycle, a different fee will necessarily be collected for the same number of kilograms of spent fuel generated from different plants. Furthermore, since the fee proposed in Title VI of S. 1662 would only be collected prospectively, these future payments do not accommodate the existing spent fuel inventories.

On the other hand, the assessment of a one mil per kilowatt-hour fee has the distinct advantage of simplicity, ease of administration and certainty of an equal assessment to all beneficiaries of the electricity from nuclear fuel, and it ensures that the waste management program will go forward in a timely manner with adequate funding. Thus, on balance, I believe that the utilities would be willing, somewhat reluctantly, to support such a mandatory fee on the electricity generated from nuclear power in return for the firm contractual commitment of the Federal government, backed by the establishment of an expedited waste management program, to take title to the radioactive waste or spent fuel for disposal. However, we also believe that a one-time fee should be paid into the waste management fund at the time of delivery of spent fuel or radioactive waste from spent fuel removed from reactor cores prior to enactment of this Act, otherwise, future customers utilizing nuclear generated electricity would pay for disposal of spent fuel from which they have received no benefit. Most utilities have taken into account the need to make such a future payment on spent fuel already removed from the reactor of their operating nuclear plants. Thus to the maximum extent practical, the actual beneficiaries of nuclear fuel would pay for the disposal costs.

We firmly believe that the legislation should authorize and direct the Secretary of Energy to enter into contracts with all nuclear power plant operators by which the Government agrees to take title to and responsibility for radioactive wastes or spent fuel, in return for the commitment of the utility to collect from its customers and pay to the Treasury a fee of one mil per kilowatt-hour of nuclear generated electricity for all nuclear fuel removed from nuclear reactors after the enactment of this bill. The contract should require a fee, generally equivalent to an average one mil per kilowatt-hour charge, to be paid by the owners of spent fuel removed from nuclear reactors prior to enactment of this bill.

Board of Directors of such an authority to monitor the expenditure of money on the waste management programs to ensure that the program is operated on a sound financial basis. In fact, even under a DOE administered program, the utility users of the waste management services should be provided a mechanism for input to the financial administration of the program.

In summary, while the electric utilities want to make it clear that they do not endorse the precedent of collecting a tax for the Federal Treasury, we recognize that nuclear waste management is a unique Federal responsibility resulting from the joint effort of the government and industry to utilize nuclear energy for the pubic benefit. We do not see this financing arrangement as a precedent, but rather an innovative mechanism for ensuring the financial viability of a long-term Federal waste management program, and thus we can endorse it.

CONCLUSION

In conclusion, we cannot emphasize strongly enough the need for action by Congress this year in implementing a federal waste management program. Interim storage capacity for spent fuel should be acquired as soon as possible. The site selections for proposed geologic repositories, and an integrated TEF at one of the proposed locations, should proceed on an expedited program. The desirability of long-term, retrievable spent fuel storage capacity must be recognized. A definite schedule for progress, such as that laid out in S. 1662, will . . .

Mr. SMITH. That is our problem. On the DOE list of plants and this is in their report, on page 11 of that report there are probably 20 some units listed. We have the first two listed that run out of spent fuel storage capability onsite. Both our Robinson No. 2 and our Brunswick No. 1 are scheduled to run out of full core discharge capability in 1986.

We have done everything that could be done. We have reracked those pools twice. We are the only company I know of that has been able to ship spent fuel from one State to another, from one plant to another.

Senator SIMPSON. Would the mandatory fee that is proposed under this legislation be automatically recoverable from your ratepayer?

Mr. SMITH. If it is mandated from Congress, yes. The situation today is, some companies are collecting a fee which is based on current DOE estimates for the cost of spent fuel storage and permanent disposal. Others have not allowed – our position is unique whereby in one jurisdiction we have been allowed to collect the fee but last week the Federal Energy Regulatory Commission denied us the right to collect that fee.

If it is managed by Congress it would flow through in all jurisdictions.

Senator SIMPSON. It is good to know you have a basic satisfaction with the provisions of the bill in that respect.

Do you support the Federal away-from-reactor provisions in this bill?

Mr. SMITH. I do, Senator Simpson.

Senator SIMPSON. I thank you, Mr. Smith. You may leave as you desire. I would ask the remaining members of the panel to go in order so next would be Mr. David Berick.

STATEMENT OF DAVID BERICK, WASHINGTON REPRESENTATIVE, ENVIRONMENTAL POLICY CENTER

Mr. Berick, I want to thank you and Senator McClure for the opportunity to testify this afternoon. With the understanding my testimony is entered in the record, I will try to summarize briefly.

After watching this debate on Capitol Hill on Nuclear waste legislation for about the last 3 1/2 years, it has become sort of obvious to me that we are really trying to tackle two separate nuclear waste problems.

The first which was brought into focus with the California moratorium in 1976 is that the failure to close the back end of the fuel cycle has cast a political cloud over the future development of nuclear power. Efforts to disperse that cloud have traditionally been proposed since 1976 for fairly expeditious treatment of the waste problem.

On the other hand we have a very real technical problem of how to physically develop licenses and construct geologic repositories within the time frame of the license period of nuclear powerplants which is something which has been explored at some length in the waste conference proceeding before the NRC.

What I would like to explore are the tradeoffs between efforts to get something as early as possible in an attempt to solve the politi . . .

NSP News Release

Release Date: November 14, 1997

Court Affirms DOE's Unconditional Obligation To Accept Spent Nuclear Fuel

MINNEAPOLIS - In a positive development for electric utility companies and consumers, the U.S. Court of Appeals for the District of Columbia Circuit today further clarified the Department of Energy's (DOE) unconditional obligation to accept spent nuclear fuel from commercial nuclear reactors.

The court's ruling is in response to a lawsuit filed in January, when Northern States Power Co. (NSP), other utilities, states and state agencies asked the court to suspend payments to the Nuclear Waste Fund until DOE meets its contractual obligation to begin accepting spent fuel by Jan. 31, 1998.

In granting the utilities' petition for relief, in part, the court emphasized that DOE can no longer use the excuse of "unavoidable delays" to explain its failure to develop and implement a plan to take spent fuel from reactors across the country by its court-affirmed deadline of Jan. 31, 1998. NSP and other utilities are running out of space in on-site pools that were originally designed for limited and temporary storage.

NSP Senior Attorney Michael Connelly views today's ruling as a "significant step in resolving the nation's spent fuel disposal and storage issue." Most importantly, he said, the court reaffirmed DOE's "unconditional, contractual and statutory obligation" to accept spent fuel by Jan. 31, 1998.

"That action paves the way for utilities, under their standard contract with DOE, to file for damages that potentially could be in the billions of dollars," Connelly said.

Through the standard contract between each utility and DOE, consumers have paid billions of dollars to the Nuclear Waste Fund since 1982. NSP and other utilities will now review options such as suing for damages resulting from DOE's failure to meet its obligations by Jan. 31, 1998.

Contracts between utilities and DOE require utilities to pay a fee per kilowatt-hour on electricity generated and sold from nuclear plants. Through monthly payments, NSP customers have paid more than $260 million to the DOE fund for nuclear waste storage and disposal since 1982. Nationwide, consumers have paid more than $13 billion.

"The court clearly stated that it expects DOE to comply with its unconditional obligation to accept spent nuclear fuel by Jan. 31, 1998," Connelly said. "While the court's ruling affirms the utilities' right to pursue contractual remedies, including damages, NSP's ultimate goal is to move the spent nuclear fuel to an interim storage facility and then to permanent storage."

For more information, contact: NSP Media Representatives, (612) 337-2167. If you'd like to see our list of past news release, please visit our index.

STATEMENT OF BART D. WITHERS,

VICE PRESIDENT, NUCLEAR,

PORTLAND GENERAL ELECTRIC CO.

Mr. WITHERS. Senator Gorton, Congressman Morrison, my name is Bart D. Withers. I am vice president, nuclear, for Portland General Electric Co. My company operates the Trojan nuclear plant located about 40 miles north of Portland, Oreg. Trojan has a net generating capacity of 1,130 MW electrical and is a major electrical generating resource for the Northwest. PGE is also the owner and constructor of the proposed two-unit Pebble Springs nuclear plant in eastern Oregon.

I am pleased to appear before you today. Portland General Electric Co. supports Senate bill 1662 because it defines a comprehensive and timely course of action by the Federal Government on nuclear waste disposal. This positive action is mandatory to insure retention of nuclear power as an option for future electrical generation and to ensure continued operation of existing nuclear plants.

Let me review our experience in dealing with spent fuel generated by Trojan.

When Trojan began operation in 1975, PGE planned to ship the spent fuel to the Allied-General Nuclear Services reprocessing plant in Barnwell, S.C. In 1977, it became clear that reprocessing would not be available, and PGE would have to temporarily store spent fuel onsite until the away-from-reactor storage facilities became available. The U.S. Department of Energy announced in 1977 that away-from-reactor storage facilities would be provided by the Federal Government by 1985.

In January 1977, PGE applied to the Nuclear Regulatory Commission for a license amendment to provide additional storage capacity at Trojan. This application resulted in a 31-day contested NRS granted in October 1978, 22 months after the initial application. Sufficient storage capacity is now available at Trojan to provide full-core discharge capacity until the spring of 1986 and for the continued annual refuelings until the spring of 1989. Positive assurance must be provided within the next year that an away-from-reactor storage facility will be in operation by 1986 to preclude nuclear utilities from having to commit to providing additional onsite storage.

Oregon State law (ORS 469.525) prohibits disposal of nuclear power-generated radioactive wastes except for temporary storage at nuclear reactor facilities. Oregon States law also precludes siting of additional nuclear plants within Oregon until a Federal nuclear waste depository is available. As a result, the Oregon States Energy Facility Siting Council suspended the hearings required to obtain approval to construct the Pebble Springs plants. It is therefore extremely important that a consistent reliable Federal policy for nuclear waste disposal be mandated by Congress to demonstrate to Oregon citizens, as well as all citizens, that nuclear waste disposal facilities will be established in a timely manner

The following provisions in Senate bill 1662 are important for prompt development of nuclear waste disposal facilities and are supported by Portland General Electric Co.:

We support the identification of specific dates for the important milestones that are required for completion of the nuclear waste management program such as promulgation of Environmental Protection Agency standards, site selection and NRC licensing.

We support the consolidation of nuclear waste Management into a coherent program that addresses away-from-reactor storage facilities, geological repositories. monitored retrievable storage and test facilities.

We support the definition of how States are to participate in the siting process and how State objections are to be resolved. The provisions of requiring one House of Congress to sustain the State's objection to a proposed cite is reasonable, although requiring both Houses of Congress to sustain the veto is preferred in view of the need for siting nuclear waste disposal facilities.

We support the clarification of how the National Environmental Policy Act is to be applied to the nuclear waste management program. We agree that a full-scale NEPA environmental impact statement should not be required until final site selection has taken place and authorization of Congress is requested for construction of the repository.

We support the assurance of funding for nuclear waste management. activities by assessing a fee of 1 mill per kilowatt-hour for electricity generated by nuclear powerplants. Although PGE does not consider requiring utilities to, in effect, collect Federal taxes to be a desirable precedent this fee is supported since it will provide necessary funding for the program.

We support the definition of how the NRC is to proceed in licensing additional onsite temporary storage of spent fuel a nuclear powerplants.

Four recommendations for changes are offered on Senate bill 1662 to facilitate completing the nuclear waste management program:

Section 302 requires the Secretary of the Department of Energy to provide away-from-reactor storage for nuclear powerplants that “cannot reasonably provide adequate spent-fuel storage at the power plant site.” The Secretary is to propose rules for use in making this determination. We recommend that this bill be made more specific to guide this determination. For example, State law, which preclude storage of nuclear or spent fuel should be considered to be sufficient demonstration that additional storage cannot be provided.

Section 305 requires the Secretary of the Department of Energy to provide away-from-reactor storage facilities as soon as possible.

OFFICE OF THE COMMISSIONER

June 12, 1996

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
350 Metro Square Building
121 7th Place East
St. Paul, Minnesota 35101-2147

RE: Investigation of the Department of Public Service into Payments by Northern States Power Company's Ratepayers to the Nuclear Waste Fund
Docket No. E002/DI-95-1137

Dear Mr. Haar:

The Department of Public Service (Department) is pleased to offer the attached report of our investigation in the above-referenced matter.

In the attached report, we present our findings concerning the legitimacy of future ratepayer contributions to the federal government's Nuclear Waste Fund (NWF). In addition, the Department offers several recommendations for Commission action to ensure that any future ratepayer contributions to finance the disposal of Northern States

Power's (NSP) nuclear waste are used for their intended purpose. Specifically, we recommend that the Commission:

- order NSP to establish an externally managed escrow account;
- require all 1%TWF payments to be diverted to that account;
- establish criteria for the release of funds placed in escrow; and
- make any recovery of funds contingent upon measurable progress in reaching a solution to NSP's waste-disposal problem.
- the estimated costs of administering the escrow account;
- the expected rates of return on funds placed in escrow under low-, moderateand high-risk scenarios; and
- any tax or other liabilities associated with the establishment and *management* of the external escrow account.

The Department believes that these measures will benefit ratepayers by:

- immediately ending ratepayer contributions to the NWF;

- ensuring Commission discretion over the use of ratepayers' contributions to finance disposal of NSP's nuclear waste;
- creating a dedicated fund to finance a solution to NSP's disposal problem;
- allowing NSP the flexibility to use the funds for either a federal or a private disposal initiative; and
- establishing specific criteria both for the recovery of funds paid into the escrow account and for their release to finance the eventual disposal of NSP's on-site nuclear waste.

The Department hopes to encourage other members of the Nuclear Waste Strategy Coalition to follow Minnesota's example and establish escrow accounts with similar conditions on the release of funds to the federal government. Similar actions by other states would maximize the impact of the Department's recommendations for Minnesota.

EXECUTIVE SUMMARY

On November 11, 1995, the Minnesota Department of Public Service (Department) initiated its *Investigation into Payments by Minnesota Ratepayers to the Nuclear Waste*

Fund. In this report, the Department presents its findings. The Department also offers several specific recommendations to the Minnesota Public Utilities Commission (Commission) concerning future ratepayer contributions to finance the disposal of Northern States Power's (NSP or the Company) on-site nuclear waste at its Prairie Island and Monticello nuclear generating stations.

In 1982, the U.S. Congress adopted the Nuclear Waste Policy Act (NWPA). The NWPA committed the federal government to dispose of nuclear waste generated by the nation's commercial nuclear facilities. Specifically, the NWFA directs the U.S. Department of Energy (DOE) to develop and implement a long-term nuclear-waste disposal program through which nuclear waste would be permanently stored in a deep geologic repository. The NWPA also provides for the possible construction and operation of a Monitored Retrievable Storage (MRS) facility for the temporary storage of waste prior to the construction of a permanent repository. In addition, the NWPA directs the federal government to begin disposing of commercial nuclear waste no later than January 31, 1998.

Pursuant to the NWPA, nuclear utilities are required to finance the federal government s disposal program by paying 1 mil (one-tenth of one cent) per kWh (1 mil/kWh) on electricity generated and sold (less transmission losses) from their nuclear plants. These utilities also are required to contribute retroactive payments on electricity generated and sold prior to the enactment of the NWPA. In order to contractually obligate utilities to make such payments, the NWPA required DOE to enter into Standard Contracts with utilities. 'These contracts set the terms and amounts of payments. Utilities had no practical alternative to entering into Standard Contracts. If utilities had failed to enter into those contracts with DOE, they risked losing their operating licenses from the Nuclear Regulatory Commission (NRC).

NSP's payments have been financed solely by NSP's ratepayers through the fuel clause adjustment (I mil/kWh), a direct pass-through which appears on monthly billing statements. To date, NSP's ratepayers have contributed roughly $231 million to the federal government's Nuclear Waste Fund (NWF), excluding interest. NSP's Minnesota ratepayers have contributed approximately $183 million of that total. These figures represent approximately $581 million and $459 million in 1995 dollars, respectively.

At the time the NWPA was passed into law, and for several years thereafter, DOE expressed its support for the waste-disposal provisions contained in the NWPA and reaffirmed its commitment to initiate disposal in 1998. By 1992, however, DOE had substantially changed its interpretation of the NWPA and no longer accepted its disposal obligations as binding. On April 28, 1995, DOE issued the "The Department of Energy Final Interpretation of Nuclear Wastes Issues," in which DOE formally stated that it will not begin its disposal of nuclear waste by January 31, 1998. In that document, DOE also argued that its disposal obligations are contingent on the existence and operation of a permanent repository. DOE has recently indicated that such a repository will not begin operation until 2010 at the earliest.

Acting on DOE's interpretation, 72 petitioners from around the country - including the Commission, the Department, the Minnesota Office of the Attorney General and NSP - filed suit in federal court against DOE seeking enforcement of the agency's obligations under the NWPA. The court has not yet ruled in that lawsuit.

Based on DOE's own statements and its continuing delays in siting a repository for commercial nuclear waste, it is highly unlikely that DOE will initiate waste disposal in the foreseeable future. The impacts of DOE's inaction and its refusal to accept its obligations are particularly relevant to the continuing operation of NSP's Prairie Island facility. If DOE fails to initiate disposal of Prairie Island's nuclear waste by 2004, the facility could be forced to shut down, given its on-site waste-storage limitation. A shutdown of Prairie Island would force Minnesota ratepayers to incur $522 - $801 million (in 1995 dollars) in additional costs. These costs would be borne by Minnesota ratepayers despite their projected contribution of $247.4 million (excluding interest) to the NWF through 2003 (i.e., the last year of NWF payments prior to the shutdown of Prairie Island). In 1995 dollars, Minnesota ratepayers will have paid approximately $502.6 million to the NWF through 2003.

In light of DOE's virtually certain failure to meet its 1998 disposal obligations, the Department believes that continued ratepayer contributions to the NWF would not constitute a legitimate expense under Minnesota Statutes. Therefore, the Department recommends that the Commission take action to ensure that contributions by Minnesota ratepayers to finance NSP's nuclear-waste disposal are used for their intended purpose. Specifically, the Department recommends that the Commission:

- order NSP to establish an externally managed escrow account;
- require all NWF payments to be diverted to that account;
- establish criteria for the release of funds placed in escrow; and
- make any recovery of funds contingent upon measurable progress in reaching a solution to NSP's waste-disposal problem.

In addition, tine Department recommends that the Commission require NSP to address several aspects of establishing and managing an external escrow account in a compliance filing to the Commission. Specifically, the Department recommends that the Commission require NSP to include, at a minimum, the following elements:

- the Company's method of determining a list of candidates to manage the escrow account, and its method of selecting a fund manager from that list;

MINNESOTA DEPARTMENT OF PUBLIC SERVICE
INVESTIGATION INTO PAYMENTS BY
MINNESOTA RATEPAYERS TO NUCLEAR WASTE
FUND

DOCKET NO. E002/DI-95-1137

I. HISTORY OF THE NUCLEAR WASTE FUND

A. WHY WAS THE FUND CREATED?

In 1982 Congress adopted the Nuclear Waste Policy Act (NWPA), which confirms the federal government's responsibility for the disposal of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) and establishes a comprehensive program for transporting, storing and disposing of the spent fuel and waste in a deep geologic repository. The NWPA also established the Office of Civilian Radioactive Waste Management (OCRWM) within the Department of Energy (DOE). The NWPA directs OCRWM to select a repository site, obtain a license for the repository from the Nuclear Regulatory Commission (NRC), and construct a repository to begin accepting spent fuel and high-level radioactive waste for disposal by January 31, 1998. The NWPA also provides for the possible construction and operation of a Monitored Retrievable Storage (MRS) facility for temporary storage prior to construction and operation of a permanent repository.

The NWPA states that utilities have the primary responsibility to provide for "the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy." DOE has no clear responsibility over waste temporarily stored by utilities prior to the agency's 1998 disposal commitment.

The NWPA authorized DOE to enter into Standard Contracts with nuclear generation utilities. These contracts set the terms for payment into the NWF and contractually obligate DOE to begin disposing of nuclear waste pursuant to the NWPA. The NWPA specified that any nuclear utility not signing a disposal contract with the DOE would not be permitted to obtain or renew a NRC license to operate its nuclear power plants. Utilities had no practical alternative to entering into the Standard Contracts and were limited by the provisions of the NWPA in their ability to negotiate the terms of these contracts.

As specified in the NWPA, the Standard Contracts require utilities to pay a fee sufficient to cover the total life-cycle costs of the repository program. These fees were initially set by the NWFA at 1 mil (one-tenth of a cent or $.001) per kilowatt-hour (1 mil/kWh) of electricity generated from each nuclear power plant. However, as a result of court cases filed against DOE by utilities, the fee was first reduced to 1 mil/kWh based on net electrical generation (allowing for electrical consumption required to operate power plants), then again to account for transmission losses of approximately 6 percent.

The Standard Contracts require that "[t]he services to be provided by DOE shall begin, after commencement of facility operations, not later than January 31, 1998." The Standard Contract further defines "facility" related to the storage of SNF and high-level waste as either a permanent repository or other facility for temporary storage. Specifically, the Standard Contracts define "facility" as follows:

> The term "DOE facility" means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE to its transportation to a disposal facility.

B. NSP'S CONTRIBUTION TO THE FUND TO DATE

In conformance with its Standard Contract, Northern States Power Company (NSP or the Company) pays 1 mil/kWh to the DOE for electricity generated and sold from its Prairie Island and Monticello nuclear plants. NSP's contributions are directly financed by ratepayers through an adjustment to their monthly electricity bills. Through 1995, NSP has made nominal payments of $136.7 million on electricity generated and sold since May 1983; the Company contributes roughly $10-$12 million per year to the NWF. In addition to ongoing payments, NSP's Standard Contract requires a retroactive payment for spent-fuel accumulations from the initial startup of the Company's nuclear plants through the initiation of the 1 mil/kWh fee. The Standard Contracts offer utilities a choice of paying a lump-sum fee or spreading payments over ten years with additional "interest" payments determined by DOE. NSP chose to pay this fee in a lump-sum of approximately $94.1 million. In total, NSP has made nominal payments to the NWF of approximately $230.8 million (i.e., $136.7 million + $94.1 million) through 1995, or $580.9 million in 1995 dollars (assuming a discount rate of 10 percent). Of that total, $459.3 million has been paid by ratepayers in NSP's Minnesota jurisdiction.

In addition to NSP's and other utilities' payments to the NWF, DOE has earned substantial interest on these funds from their placement in interest-bearing accounts by the U.S. Department of Treasury. According to figures compiled by the Iowa Utilities Board, NSP's payments alone account for approximately $80.1 million in interest earned through 1995. Total nominal payments of approximately $7.3 billion ($18.3 billion in 1995 dollars) from all nuclear utilities through 1995 have earned $2.5 billion in interest. Outstanding debt to the NWF amounts to an additional $2 billion. The NWF's current liability (i.e., nominal payments plus interest earned plus outstanding debt) totals approximately $11.8 billion through 1993 (Table 1).

U.S. DEPARTMENT OF ENERGY
OFFICE OF PROCUREMENT OPERATIONS
CONTRACT DISTRIBUTION SHEET

CONTRACTOR: Northern States Power Co.

CONTRACT NUMBER: DE-CROI 83NE44473

ADDRESS: 414 Nicollet Mall

MODIFICATION NUMBER: -

CITY/STATE/ZIP: Minneapolis MN 55401

DATE: 6/29/83

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XX CONTRACTOR: copy mailed 6/29/83

XX OFFICE OF CONTROLLER-ACCOUNTING OPERATIONS BRANCH: Dotti Gibson, MA-323.1, GTN

XX OFFICIAL CONTRACT FILE: Thomas S. Keefe, Contracting Officer, MA-453.1, FORSTL

II. SUPPLEMENTAL DISTRIBUTION *(1 Copy Each)* *(Check appropriate box(es) for copy distribution)*

☐ CONTRACT SPECIALIST

XX TECHNICAL REPRESENTATIVE

NAME: Mike Kurgan

BUILDING: FORSTL CODE: S-10

ROOM NO. 7B-08

XX Office of Wash., Financial Services: James Maraldo, MA-32

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IV. CONTRACTING DOE ORGANIZATION:

MAILING ADDRESS

CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

THIS CONTRACT, entered into this 20th day of June 1983, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as "DOE") and Northern States Power Company. (hereinafter referred to as the "Purchaser"), a corporation organized and existing under the laws of the State of Minnesota.

WITNESSETH THAT:

WHEREAS, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors in order to protect the public health and safety, and the environment; and

WHEREAS, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel; and

WHEREAS, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste; and … from owners and generators delivering to the DOE such spent nuclear fuel and/or high level radioactive waste; and

WHEREAS, the DOE is authorized to enter into contracts for the permanent disposal of spent nuclear fuel and/or high-level radioactive waste of domestic origin in DOE facilities; and

WHEREAS, the Purchaser desires to obtain disposal services from DOE; and

WHEREAS, DOE is obligated and willing to provide such disposal services, under the terms and conditions hereinafter set forth; and

WHEREAS this contract is made and entered into under the authority of the DOE Organization Act (Pub. L. 95-91, 42 U.S.C. 7101 et seq.) and the Nuclear Waste Policy Act of 1982 (Pub. O. 97-425, 42 U.S.C. 10101 et seq.)

NOW, THEREFORE, the parties hereto do hereby agree as follows:

ARTICLE I – DEFENITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

1. The term "assigned three-month period" means the period that each Purchaser will be assigned by DOE, giving due consideration to the Purchaser's assignment preference, for purposes of reporting kilowatt hours generated by the Purchaser's nuclear power reactor and for establishing fee due and payable to DOE.
2. The term "cask" means a container for shipping spent nuclear fuel and/or high-level radioactive waste which meets all applicable regulatory requirements.
3. The term "civilian nuclear power reactor" means a civilian nuclear powerplant required to be licensed under Sections 103 or 104(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2133, 2134(b)).
4. The term "Commission" means the United States Nuclear Regulatory Commission.
5. The term "contract" means this agreement and any duly executed amendment or modification thereto.

6. The term "Contracting Officer" means the person executing this contract on behalf of the Government , and any other officer or civilian employee who is properly designated Contracting Officer of the DOE; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

7. The term "delivery" means the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste from Purchaser to DOE at the Purchaser's civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.

8. The term "disposal" means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive waste with no forseeable intent of recovery, whether or not such emplacement permits recovery of such waste.

9. The term "DOE" means the United States Department of Energy of any duly authorized representative thereof, including the Contracting Officer.

10. The term "DOE facility" means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive wste may be shipped by DOE prior to its trasportation to a disposal facility.

11. The term "full cost recovery," means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425). As used herein, the term "cost" includes the application of Nuclear Waste Fund monies for those uses expressly set forth in section 302(d) and (e) of the said Act and all other uses specified in the Act.

12. The term "high-level radioactive waste" (HLW) means –

(a) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(b) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

13. The term "kilowatt hours generated" means electricity generated by nuclear fuel at a civilian nuclear power reactor specified in Appendix A hereto as measured at the output terminals of the turbine generator, including an equivalent amount of electricity for any process best generated by the reactor and used other than at the reactor.

14. The term "metric tons uranium" means that measure of weight equivalent to 2,204.6 pounds of uranium and other fissile and fertile material that are loaded into a reactor core as fresh fuel.

15. The term "Purchaser's site" means the location of Purchaser's civilian nuclear power reactor or such other location as the Purchaser may designate.

16. The term "quarterly Treasury rate" means the current value of funds rate as specified by the Treasury Fiscal

Requirements Manual, Volume 1, Part 6, section 8020.20. This rate is published quarterly in the Federal Register prior to the beginning of the affected quarter.

17. The term "shipping lot" means a specified quantity of spent nuclear fuel or high-level radioactive waste designated by Purchaser for delivery to DOE beginning on a specified date.

18. The term "spent nuclear fuel" (SNF) means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

19. The term "spent nuclear fuel and high-level radioactive waste of domestic origin" means irridiated fuel material used, and radioactive wastes resulting from such use, in nuclear power reactors located only in the United States.

20. The term "year" means the period which begins on October 1 and ends on September 30.

This contracts applies to the delivery by Purchaser to DOE of SNF and/or HLW of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such SNF and/or HLW, subsequent transportation, and disposal of such SNF and/or HLW and, with respect to such material, establish the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The SNF and/or HLW shall be specified in a delivery commitment sched as provided in Article V below. The services to be provided by DOE under the contract shall begin, after commencement of facility operations, not later than the civilian nuclear power reactors specified in Appendix A, annexed hereto and made a part hereof, has been disposed of.

ARTICLE III – TERM

The term of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser's site(s) and disposed of all SNF and/or HLW of domestic origin from the civilian nuclear power reactor specified in Appendix A.

ARTICLE IV – RESPONSIBILITIES OF THE PARTIES

A. Purchaser's Responsibilities

1. Discharge Information

(a) On an annual basis, commencing October 1, 1983, the Purchaser shall provide DOE with information on actual discharges to data and projected discharges for the next ten (10) years in the form and content set forth in

Appendix B, annexed hereto and made a part hereof. The information to be provided will include estimates and projection and will not be Purchaser's firm commitment with respect to discharges or deliveries.

(b) No later than October 1, 1983, the Purchaser shall provide DOE with specific information on:

(1) Total spent nuclear fuel inventory as of April 7, 1983;

(2) Total number of fuel assemblies removed from the particular reactor core prior to 12:00 A.M. April 7, 1983 for which there are plans for reinsertion in the core, indicating the current planned dates for reinsertion in the core. Estimates of the burned and unburned portion of each individual assembly are to be provided.

(c) In the event that the Purchaser fails to provide the annual forecast in the form and contact required by DOE, DOE may, in its sole discretion, require a rescheduling of any delivery commitment schedule then in effect.

2. Preparation for Transportation

(a) The Purchaser shall arrange for, and provide, all preparation, packaging, required inspections, and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility. The Purchaser shall notify DOE of such activities sixty (60) days prior to the commencement of such activities. The preparatory activities by the Purchaser shall be made in accordance with all applicable laws and regulations relating tot he Purchaser's responsibilities hereunder. DOE may designate a representative to observe the preparatory activities conducted by the Purchaser at the Purchaser's site, and the Purchaser shall afford access to such representative.

(b) Except as otherwise agreed to be DOE, the Purchaser shall advise DOE, in writing as specified in Appendix F, annexed hereto and made a part hereof, as to the description of the material in each shipping lot sixty (60) days prior to scheduled DOE transportation of that shipping lot.

(c) The Purchaser shall be responsible for incidental maintenance, protection and preservation of any and all shipping casks furnished to the Purchaser by DOE for the performance of this contract. The Purchaser shall be liable for any loss of or damage to such DOE-furnished property, and for expenses incidental to such loss or damage while such casks are in the possession and control of the Purchaser except as otherwise provided for hereunder. Routine cask maintenance, such as scheduled overhauls, shall not be the responsibility of the Purchaser.

1. DOE shall accept title to all SNF and/or HLW domestic origin generated by the civilian nuclear power reactor(s) specified in Appendix A, provided subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract.
2. DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser's site tot he DOE facility. Such cask(s) shall be furnished sufficiently in advance to accommodate scheduled deliveries. Such cask(s) shall be suitable for use at the Purchaser's site, meet applicable regulatory requirements, and be accompanied

by pertinent information including, but not limited to, the following:

(a) written procedures for cask handling and loading, including specifications on Purchaser-furnished canisters for containing of failed fuel;

(b) training for Purchaser's personnel in cask handling and loading, as may be necessary;

(c) technical information, special tools, equipment, lifting trunnions, spare parts and consumables needed to use and perform incidental maintenance on the cask(s); and

(d) sufficient documentation on the equipment supplied by DOE.

3. DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors.

4. DOE shall annually provide to the Purchaser pertinent information on the waste disposal program including information on cost projections, project plans and progress reports.

5. (a) Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of SNF and/or HLW at the DOE repository. This priority

ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs 8 and D of Article V and paragraph B.3 of Article VI hereof.

(b) Beginning not later than July 1, 1987, DOE shall issue an annual capacity report for planning purposes. This report shall set forth the projected annual receiving capacity for the DOE facility(ies) and the annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW including, to the extent available, capacity information for ten (10) years following the projected commencement of operation of the initial DOE facility.

ARTICLE V- DELIVERY OF SNF AND/OR HLW

A. Description of SNF and HLW

The purchaser shall deliver to DOE and DOE shall, as provided in this contract, accept the SNF and/or HLW which is described in accordance with Article VI.A. of this contract, for disposal thereof.

B. Delivery Commitment Schedule

1. Delivery commitment schedule(s), in the form set forth in Appendix C annexed hereto and a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance prior ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF and/or HLW the Purchaser wishes to delivery to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedule within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or

minus (±) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.

C. Final Delivery Schedule

Final delivery schedule(s), in the form set forth in Appendix D, annexed hereto and made a part hereof, for delivery of SNF and/or HLW covered by an approved deliver commitment schedule(s) shall be furnished to DOE by Purchaser. The Purchaser shall submit to DOE final delivery schedules not less than two (2) months prior tot he delivery data specified therein. DOE shall approve or disapprove a final delivery schedule within forty-five (45) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE notice of disapproval, DOE shall approve or disapprove such revised schedule within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s).

D. Emergency Deliveries

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.

E. Exchanges

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; provided, however, that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; provided, however, that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the purchaser's approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

ARTICLE VI – CRITERIA FOR DISPOSAL

A. General Requirements

1. Criteria

(a) Except as otherwise provided in this contract, DOE shall accept hereunder only such SNF and/or HLW which meets the General Specifications for such fuel and waste as set forth in Appendix E, annexed hereto and made a part hereof.

(b) Purchaser shall accurately classify SNF and/or HLW prior to delivery in accordance with paragraphs B and D of Appendix E.

2. Procedures

(a) Purchaser shall provide to DOE a detailed description of the SNF and/or HLW to be delivered hereunder in the form and content as set forth in Appendix F, annexed hereto and made a part hereof. Purchaser shall promptly advise DOE of any changes in said SNF and/or HLW as soon as they become known to the Purchaser.

(b) DOE's obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser is other than standard fuel, as that term is defined in Appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advised Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

B. Acceptance Procedures

1. Acceptance Priority Ranking

Delivery commitment schedules for SNF and/or HLW may require the … of more material than the annual capacity of the DOE disposal … (or facilities) can accommodate. The following acceptance priority ranking will be utilitized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from date of discharge of such material from the civilian nuclear power reactor, DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B, D and E of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SHF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

2. Verification of SNF and/or HLW

During cask loading and prior to acceptance by DOE for transportation to the DOE facility, the SNF and/or HLW description of the shipping lot shall be subject to verification by DOE. To the extent the SNF and/or HLW is consistent with the description submitted and approved, in accordance with Appendices E and F, DOE agrees to accept such SNF and/or HLW for disposal when DOE has verified the SNF and/or HLW description, determined the material is properly loaded, packaged, marked and labeled and ready for transportation, and has taken custody, as evidenced in writing, of the material at the Purchaser's site, f.o.b. carrier. A properly executed off-site radioactive shipment record describing cask contents must be prepared by the Purchaser along with a signed certification which states: "This is to certify that the above-named materials are properly described, classified, packaged, marked and labeled and are in proper condition for transfer according to the applicable regulations of the U.S. Department of Transportation."

3. Improperly Described SNF and/or HLW

   (a) Prior to Acceptance – If SNF and/or HLW is determined by DOE to be improperly described prior to acceptance by DOE at the Purchaser's site, DOE shall promptly notify the Purchaser in writing of such determination. DOE reserves the right, in its sole discretion, to refuse to accept such SNF and/or HLW until the SNF and/or HLW has been properly described. The Purchaser shall not transfer such SNF and/or HLW to DOE unless DOE agrees to accept such SNF and/or HLW under such other arrangements as may be agreed to, in writing, by the parties.

   (b) After Acceptance – If subsequent to its acceptance DOE finds that such SNF and/or HLW is improperly described, DOE shall promptly notify the Purchaser, in writing, of such finding. In the event of such notification, Purchaser shall provide

DOE with a proper designation within thirty (30) days. In the event of a failure by the Purchaser to provide such proper designation, DOE may hold in abeyance any and all deliveries scheduled hereunder.

ARTICLE VII – TITLE

Title to all SNF and/or HLW accepted by DOE for disposal shall pass to DOE at the Purchaser's site as provided for in Article VI hereof. DOE shall be solely responsible for control of all material upon passage of title. DOE shall have the right to dispose as it sees fit of any SNF and/or HLW to which it had taken title. The Purchaser shall have no claim against DOE or the Government with respect to such SNF or HLW nor shall DOE or the Government be obligated to compensate the Purchaser for such material.

ARTICLE VIII – FEES AND TERMS OF PAYMENT

A. FEES

1. Effective April 7, 1983 Purchaser shall be charged a fee in the amount of 1.0 mill per kilowatt-hour (1M/KWH) on electricity generated by Purchaser's nuclear power reactor(s). The said fee shall be paid as specified in paragraph B of this Article VIII.

2. For SNF, or solidified high-level radioactive waste derived from SNF, which fuel was used to generate electricity in a civilian nuclear power reactor prior to April 7, 1983, a one-time fee will be assessed by applying industry-wide average dollar per kilogram charges to four (4) distinct ranges of fuel burnup so that the integrated cost across all discharged (i.e. spent) fuel is equivalent to an industry-wide average charge of 1.0 mill per kilowatt-hour. For purposes of this contract, discharged nuclear fuel is that fuel removed from the reactor core with no plans for reinsertion. In the event that any such fuel withdrawn with plans for reinsertion is not reinserted, then the applicable fee for such fuel shall be calculated as set forth in this paragraph 2. The categories of spent nuclear fuel burnup and the fee schedule.

Nuclear Spent Fuel Burnup Range	. . . . (1. Dollars)
0-5,000 MWDT/MTU	$ 80.00
5,000-10,000 MWDT/MTU	142.00

10,000-20,000 MWDT/MTU	162.00
over 20,000 MWDT/MTU	184.00

This fee shall not be subject to adjustment, and the payment thereof by the Purchaser shall be made to DOE as specified in paragraph B of this Article VIII.

3. For in-core fuel as of April 7, 1983, that portion of the fuel burned through April 6, 1983 shall be subject to the one-time fee as calculated in accordance with the following methodology: [a] determine the total weight in kilograms of uranium loaded initially in the particular core; [b] determine the total megawatts-days (thermal) which have been generated by all of the fuel assemblies in the said core as of 12:00 A.M. April 7, 1983; [c] divide the megawatt-days (thermal) generated in the said core by the total metric tons of initially loaded uranium in that core and multiply the quotient by the conversion factor 0.0078 to obtain a value in dollars per kilogram; and [d] multiply the dollars per kilogram value by the kilograms determined in [a] above to derive the dollar charge for the one-time fee to be paid for the specified in-core fuel as of 12:00 A.M. April 7, 1983. For purposes of this contract, in-core fuel is that fuel in the reactor core as of the date specified, plus any fuel

removed from the reactor with plans to reinsert. That portion of such fuel unburned as of 12:00 A.M. April 7, 1983 shall be subject to the 1.0 mill per kilowatt-hour charge. The 1M/KWH fee, if necessary, in order to assume full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

B. PAYMENT

1. For electricity generated by the Purchaser's civilian nuclear power reactor(s) on or after April 7, 1983, fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of business on the last business day of the month following the end of each assigned three month period. The first payment shall be due on July 31, 1983, for the period April 7, 1983 to June 30, 1983. A one time adjustment period payment shall be due on n/a, for the period n/a to

n/a. The assigned three month period, for purposes of payment and reporting of kilowatt hours, shall begin July 1, 1983.

2. For SNF discharged prior to April 7, 1983, and for in-core burned fuel as of 12:00 A.M. April 7, 1983, the Purchaser shall, within two (2) years of contract execution, select one of the following fee payment options:

   (a) OPTION 1 - The Purchaser's financial obligation for said fuel shall be prorated evenly over forty (40) quarters and will consist of the fee plus interest on the outstanding fee balance. The interest from April 7, 1983, to date of the first payment is to be calculated based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period. Beginning with the first payment, interest is to be calculate on Purchaser's financial obligation plus accrued interest, at the ten-year Treasury note rate in effect on the date of the first payment. In no event shall the end of the forty (40) quarters extend beyond the first scheduled delivery date as reflected in the DOE-approved delivery commitment schedule. The payments shall be made concurrently with the assigned three-month period payments. At any time prior to the end of the forty (40) quarters, Purchaser may, without penalty, make a full or partial lump sum payments at any of the assigned three month period payment dates. Subsequent quarterly payments will be appropriately reduced to reflect the reduction in the remaining balance in the fee due and payable. The remaining financial obligation, if any, will be subject to interest at the same ten-year Treasury note rate over the remainder of the ten year period.

(b) OPTION 2 – The Purchaser's financial obligation shall be paid in the form of a single payment anytime prior to the first delivery, as reflected in the DOE approved delivery commitment schedule, and shall consist of the fee plus interest on the … be calculated from April 7, 1983, to the date of … payment based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period until payment.

(c) OPTION 3 – The Purchaser's financial obligation shall be paid prior to June 30, 1984, or prior to two (2) years after contract execution, whichever comes later, in the form of a single payment and shall consist of all outstanding fees for SNF and in-core fuel burned prior to April 7, 1983. Under this option, no interest shall be due to DOE from April 7, 1983, to the date of full payment on the outstanding fee balance.

3. Method of Payment

(a) Payments shall be made by wire transfer, in accordance with instructions specified by DOE in

Appendix G, annexed hereto and made a part hereof, and must be received within the time periods specified in paragraph B.1. of this Article VIII.

(b) The Purchaser will complete a Standard Remittance Advice, as set forth in Appendix G, for each assigned three month period payment and mail it postmarked no later than the last business day of the month following each assigned three month period to "Department of Energy, Office of the Controller, Cash Management Division, Box 500, Room D-208, Germantown, Maryland 20874."

4. Any fees not paid on a timely basis or underpaid because of miscalculation will be subject to interest as specified in paragraph C of this Article VIII.

C. Interest on Late Fees

1. DOE will notify the Purchaser of amounts due only when unpaid or underpaid by the dates specified in paragraph B above. Interest will be levied according to the following formula:

Interest = Unpaid Balance Due To DOE For Assigned Three Month Period X Quarterly Treasury Rate Plus Six Percent

(6%) X Number of Months Late Including Month of Payment (Fraction Rounded up to Whole Month)/12.

2. Interest is payable at any time prior to the due date for the subsequent assigned three month period fee payment. Nonpayment by the end of the subsequent assigned three month period will result in compounding of interest due. Purchaser shall complete a Standard Remittance Advice for interest payments.

3. Following the assessment of a late fee by DOE, payments will be applied against accrued interest first and the principal thereafter.

D. Effect of Payment

Upon payment of all applicable fees, interest and penalties on unpaid or underpaid amounts, the Purchaser shall have no further financial obligation to DOE for the disposal of the accepted SNF and/or HLW.

E. Audit

1. The DOE or its representative shall have the right to perform any audits or inspections necessary to determine whether Purchaser is paying the correct amount under the fee schedule and interest provisions set forth in paragraph A, B and C above.

2. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

3. The Purchaser shall furnish DOE with such records, reports and data as may be necessary for the determination of quantities delivered hereunder and for final settlement of amounts due under this contract and shall retain and make available to DOE and its authorized representative for examination at all reasonable times such records, reports and data for a period of three (3) years from the completion of delivery of all material under this contract.

ARTICLE IX - DELAYS

A. Unavoidable Delays by Purchaser or DOE

Neither the Government nor the Purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE – such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather – cause delay in scheduled delivery, acceptance or transport of SNF and/or HLW, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. Avoidable Delay by Purchaser or DOE

In the event of any delay in the delivery, acceptance or transport of SNF and/or HLW to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

ARTICLE X – SUSPENSION

A. In addition to any other rights DOE may have hereunder, DOE reserves the right, at no costs to the Government, to suspend this contract or any portion thereof upon written notice to the Purchaser within ninety (90) days of the Purchaser's failure to perform its obligations hereunder, and the Purchaser's failure to take corrective action within thirty (30) days after written notice of such failure to perform as provided above, unless such failure shall arise from causes beyond the control and without the fault or negligence of the Purchaser, its contractors or agents. However, the Purchaser's obligation to pay fees required hereunder shall continue unaffected by any suspension. Any such suspension shall be rescinded if and when DOE determines that Purchaser has completed corrective action.

B. The DOE reserves the right to suspend any schedules deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract. In the event of such a suspension by the Government, the DOE shall refund that portion of payments representing services not delivered as determined by the Contracting Officer to be an equitable adjustment. Any disagreement arising From the refund payment, if any, shall be resolved as provided in the clause of this contract, entitled to "DISPUTES."

ARTICLE XI - REMEDIES

Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

ARTICLE XII - NOTICES

All notices and communications between the parties under this contract (except notices published in the

Federal Register) shall be in writing and shall be sent to the following addressees:

To DOE: U.S. Department of Energy
Procurement and Assistance Management Directorate
Office of Procurement Operations
Washington D.C. 20585
Attn: Thomas S. Keefe

To the Purchaser:
D.H. Peterson
Manager, Fuel Supply
414 Nicollet Mall
Minneapolis MN 55401

However, the parties may change the addresses or addressees for such notices or communications without formal modification to this contract; provided, however, that notice of such changes shall be given by registered mail.

ARTICLE XIII - REPRESENTATION CONCERNING NUCLEAR HAZARDS INDEMNITY

A. DOE represents that it will include in its contract(s) for the operation of DOE facility an indemnity agreement based upon Section 170(d) of the Atomic Energy Act of 1954, as amended, a copy of which agreement shall be furnished to the Purchaser; that under said agreement, DOE shall have agreed to indemnify the contractor and other persons indemnified against claims for public liability (as defined in said Act) arising out of or in connection with contractual activities; that the indemnity shall apply to covered nuclear incidents which (1) take place at a contract location; or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a contract location. The obligation of DOE to indemnify shall be subject to the conditions stated in the indemnity agreement.

B. The provisions of this Article XIII shall continue beyond the term of this contract.

ARTICLE XIV - ASSIGNMENT

The rights and duties of the Purchaser may be assignable with transfer of title to the SNF and/or HLW involved; provided, however, that notice of any such transfer shall be made to DOE within ninety (90) days of transfer.

ARTICLE XV - AMENDMENTS

The provisions of this contract have been developed in the light of uncertainties necessarily attendant upon long-term contracts. Accordingly, at the request of either DOE or Purchaser, the parties will negotiate and, to the extent mutually agreed, amend this contract as the parties may deem to be necessary or proper to reflect their respective interests; provided, however, that any such amendment shall be consistent with the DOE final rule published in the Federal Register on April 18, 1983 entitled, "Standard

Contract for Disposal of SNF and/or HLW", as the same may be amended from time to time.

ARTICLE XVI - DISPUTES

A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the Contracting Officer a written appeal addressed to a DOE Board of Contract Appeals (Board). The decision of the board shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessary to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

B. For Purchaser's claims of more than $50,000, the Purchaser shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Purchaser's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. The certification shall be executed by the Purchaser if an individual. When the Purchaser is not an individual, the certification shall be executed by a senior company official in charge at the Purchaser's plant or location involved, or by an officer or general partner of the Purchaser having overall responsibility for the conduct of the Purchaser's affairs.

C. For Purchaser claims of $50,000 or less, the Contracting Officer must render a decision within sixty (60) days. For Purchaser claims in excess of $50,000, the Contracting Officer must decide the claim within sixty (60) days or notify the Purchaser of the date when the decision will be made.

D. This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; provided, however, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE XVII – OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XVIII – COVENANT AGAINST CONTINGENT FEES

The Purchaser warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to increase the contract price or consideration, or otherwise recover, the full amount of such commission, brokerage, or contingent fee.

ARTICLE XIX – EXAMINATION OF RECORDS

The Purchaser agrees that the Comptroller General of the United States of any of his duly authorized representatives shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Purchaser involving transactions related to this contract until the expiration of three years after final payment under this contract.

ARTICLE XX - PERMITS

The Government and the Purchaser shall procure all necessary permits or licenses (including any special nuclear material licenses) and comply with all applicable law and regulations of the United States, States and municipalities necessary to execute their respective responsibilities and obligations under this contract.

ARTICLE XXI – TECHNICAL DATA

A. Definitions

1. "Technical data" means recorded information regardless of form or characteristic, of a specific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations

in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

2. "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(a) Are not generally known or available from other sources without obligation concerning their confidentiality;

(b) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(c) Are not already available to the Government without obligation concerning their confidentiality.

3. "Contract data" means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, or technical data actually delivered in connection with the contract.

4. "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

B. Allocation of rights.

1. The Government shall have:

(a) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data properly marked as authorized by this clause;

(b) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical state furnished hereunder, if in response to a written inquiry by DOE concerning the proprietary nature of the markings, the Purchaser fails to respond thereto within 60 days or fails to substantiate the proprietary nature of the markings. In either case DOE will notify the Purchaser of the action taken;

(c) No rights under this contract in any technical data which are not contract data.

3. Subject to the foregoing provisions of this rights in technical data clause, the Purchaser shall have the right to mark proprietary data it furnishes under the contract with the following legend and no other, the terms of which shall be binding on the Government:

LIMITED RIGHTS LEGEND

This "proprietary data," furnished under "Contract No. DE-CR01-83-NE44473.000" with the U.S. Department of Energy may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Purchaser, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

(b) This "proprietary data" may be disclosed to contractors participating in the Government's program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

3. In the event that proprietary data of a third party, with respect to which the Purchaser is subject to restrictions on use or disclosure, is furnished with the Limited Rights Legend above, Purchaser shall secure the agreement of such third party to the rights of the Government as set forth in the Limited Rights Legend. DOE shall upon request furnish the names of those contractors to which proprietary data has been disclosed.

ARTICLE XXII – ENTIRE CONTRACT

A. This contract, which consists of Articles I through XXII and Appendices A through G, annexed hereto and made a part hereof, contains the entire agreement between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course or dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract.

B. Nothing in this contract is intended to affect in any way the contractual obligation of any other persons with whom the Purchaser may have contracted with respect to assuming some or all disposal costs or to accept title to SNF and/or HLW.

C. Appendices:

A. Nuclear Power Reactor(s) or Other Facilities Covered

B. Discharge Information (Ten Years Annual)

C. Delivery Commitment Schedule

D. Final Delivery Schedule

E. General Specifications

F. Detailed Description of Purchaser's Fuel

G. Standard Remittance Advice

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

UNITED STATES OF AMERICA
UNITED STATES DEPARTMENT OF ENERGY
BY: /S/
Contracting Officer Thomas S. Keefe

Witnesses as to Execution on Behalf of Purchaser

David H. Peterson /s/
414 Nicollet Mall
Minneapolis MN 55401

I, Arland D. Brusven, certify that I am the Secretary & Financial Counsel who signed this document on behalf of Purchaser was then Senior Vice President Power Supply of said corporation; that said document was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said corporation this 21st day of June, 1983.

(corporate seal) /s/

(Signature)

APPENDIX A

NUCLEAR POWER REACTOR(S) OR OTHER FACILITIES COVERED

Purchaser Northern States Power Company

Contract Number/Date DE-CRO1-83-NE44473.000 / June 15, 1983

Reactor/Facility Name Monticello Nuclear Generating Plant

Location: Street Old Highway 152

City Monticello

County/State Stearns / Minnesota

Zip Code 55362

Capacity (MWE) – Gross 569

Reactor Type: BWR X

PWR ☐

Other (Identify)

Facility Description: This contract for disposal of spent nuclear fuel and/or high-level radioactive waste shall cover the first 1058 fuel bundles which have been finally discharged from the reactor under the Northern States Power Company/General Electric Company Fuel Cycle Services Contract dated December 4, 1967. The remaining fuel bundles discharged from NSP's Monticello's reactor after the first 1058 finally discharged shall be covered under U.S. Department of Energy's Contract No. DE-DRO1-83-NE44473.000.

Date of Commencement of Operation 7/4/71

(actual or estimated)

NRC License #: DPR-22

By Purchaser:

/s/	Manger, Fuel Supply Dept.	6/21/83
Signature	Title	Date